(1) Supreme Court, U.S.
FILED

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No. OFFICE OF THE CLERK

In the Supreme Court of the United States

IQ PRODUCTS COMPANY,

Petitioner,

v.

PENNZOIL-QUAKER STATE COMPANY AND PANDORA MANUFACTURING, INC.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

KENNETH M. MORRIS
Counsel of Record

KENNETH M. MORRIS, P.C.
600 JEFFERSON STREET
SUITE 800
HOUSTON, TX 77002
(713) 659-8697

Counsel for Petitioner

BECKER GALLAGHER LEGAL PUBLISHING, INC.,
CINCINNATI, OHIO 800-890-5001

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QUESTION PRESENTED

Federal law requires that a flammable aerosol product be labeled "Flammable" on the can.

1. Does the omission of the required "Flammable" label constitute a "false or misleading description of fact" or a "false or misleading representation of fact" about the product under the Lanham Act when the omission conveys the false message that the product is *not* flammable?

PARTIES TO THE PROCEEDING

Petitioner

Petitioner is IQ Products Company ("IQ"), a corporation that is a wholly owned subsidiary of IQ Holdings, Inc. None of IQ Holdings, Inc.'s stock is publicly held. IQ was the plaintiff, intervenor defendant, and counter claimant in the district court and the appellant in the Fifth Circuit Court of Appeals.

Respondents

1. Pennzoil-Quaker State Company ("Pennzoil") is a corporation. All of Pennzoil's stock is owned by a wholly owned subsidiary of Royal Dutch Petroleum Company, whose stock is publicly held and traded on the New York Stock Exchange. Pennzoil was the intervenor plaintiff and counter defendant in the district court and an appellee in the Fifth Circuit Court of Appeals.

2. Pandora Manufacturing, Inc. ("Pandora") is a corporation whose stock is not publicly held. Pandora was the defendant in the district court and an appellee in the Fifth Circuit Court of Appeals.

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TO THE SUPREME COURT OF THE UNITED STATES:

IQ respectfully petitions for a writ of certiorari to review the judgment of the Fifth Circuit Court of Appeals in this case.

STATEMENT OF JURISDICTION

The judgment of the Fifth Circuit Court of Appeals was entered on September 23, 2002. The Fifth Circuit's opinion (App. A at 1a) is reported at 305 F.3d 368 (5th Cir. 2002). The Court of Appeals entered an order denying a timely petition for rehearing and a timely petition for rehearing *en banc* on October 24, 2002. [1]

Section 1254(1) of the Judicial Code, 28 U.S.C. § 1254(1), confers this Court's jurisdiction.

STATUTES AND REGULATIONS INVOLVED

This case involves the following statutory and regulatory provisions:

A. 15 U.S.C. § 1125(a)(1)(B) (the Lanham Act), providing a private right of action for the false advertising of goods.

B. 15 U.S.C. § 1263(a) (the Federal Hazardous Substances Act), prohibiting the introduction into interstate

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[1] App. F at 70a.

commerce of any misbranded hazardous substance.

1. 15 U.S.C. § 1261(p)(1)(E), defining a "misbranded hazardous substance" to include a "flammable" substance that is not labeled "Flammable" conspicuously on its container.

2. 15 U.S.C. § 1261(f)(1)(A)(v), defining a "hazardous substance" to include any substance or mixture of substances which is "flammable."

3. 15 U.S.C. § 1261(l)(1), providing that the term "flammable" as applied to the content of a self-pressurized container shall be defined by regulations issued by the Consumer Product Safety Commission.

4. 15 U.S.C. § 1261(n), defining "label" to mean a display of written, printed, or graphic matter upon the immediate container of any substance.

C. 16 C.F.R. § 1500.3(c)(6)(viii), defining "flammable contents of a self-

pressurized container" pursuant to 15 U.S.C. § 1261(l)(1).

15 U.S.C. § 1125(a)(1)(B)(2002) provides that "[a]ny person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which . . . in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act."

15 U.S.C. § 1263(a)(2002) provides that "[t]he following acts and the causing thereof are prohibited: [t]he introduction or delivery for introduction into interstate commerce of any misbranded hazardous substance. . . ."

15 U.S.C. § 1261(p)(1)(E) (2002) provides that "[t]he term 'misbranded hazardous substance' means a hazardous substance . . . if such

substance . . . fails to bear a label which states conspicuously an affirmative statement of the principal hazard or hazards, such as 'Flammable'. . . ."

15 U.S.C. § 1261(f)(1)(A)(v)(2002) provides that "[t]he term 'hazardous substance' means [a]ny substance or mixture of substances which is flammable. . . ."

15 U.S.C. § 1261(l)(1)(2002) provides that "[t]he terms 'extremely flammable,' 'flammable,' and 'combustible' as applied to . . . the content of a self-pressurized container shall be defined by regulations issued by the [Consumer Product Safety] Commission."

15 U.S.C. § 1261(n)(2002) provides that "[t]he term 'label' means a display of written, printed, or graphic matter upon the immediate container of any substance. . . ."

16 C.F.R. § 1500.3(c)(6)(viii) (2002) provides that "[t]he Consumer Product Safety Commission, by the regulations published in this section, defines the term[] . . . flammable . . ., appearing in section 2(1) of the Federal Hazardous Substance Act, as follows: Flammable contents of self-pressurized

container means contents of a self-pressurized container that, when tested by the method described in Sec. 1500.45, a flame projection exceeding 18 inches is obtained at full valve opening, or flashback (a flame extending back to the dispenser) is obtained at any degree of valve opening."

STATEMENT OF THE CASE

IQ asserted false advertising claims under the Lanham Act against Pandora [2] and Pennzoil in the district court. Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a), conferred district court jurisdiction.

IQ manufactures and sells two tire-inflator products. The brand names of these two tire inflators are RepairSafe and AirUp.

Pandora manufactured and sold a tire-inflator product under the brand name Fix-A-Flat at all relevant times before November 4, 1997. Pandora sold its rights to the Fix-A-Flat brand and its tire-inflator business (among other assets) to Pennzoil on November 4, 1997. Pennzoil has sold a tire-inflator product under the brand name Fix-A-Flat continuously since November 4, 1997.

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[2] Pandora was formerly known as Snap Products, Inc. ("Snap"). Snap changed its name to Pandora Manufacturing, Inc. on February 1, 1998.

In substance, a tire-inflator product uses pressurized gas to reseal and inflate a tire after the tire has deflated. Tire inflators are packaged and sold in self-pressurized aerosol containers.

The concept behind the tire-inflator product is simple: provide consumers with a compact can of inflator and sealer that can be introduced into an automobile tire to repair a leak until a more permanent repair or replacement can be made. These products have two essential components: (1) a gas propellant, which injects the sealant and inflates the tire; and (2) a liquid sealant, which patches the leak.

Tire inflators can be dangerous if their formula is flammable. Metal tools are used by many repairmen to repair or replace a tire. These tools are used to punch through the tire (tire reaming), or to remove the tire from the wheel rim. Further, repairmen occasionally weld on rims or engage in other metal-on-metal contact while working with damaged tires or wheels. These techniques can easily result in a spark. Even a slight spark can cause a significant explosion if the tire-inflator's formula is flammable. Consequently, tire inflators containing a flammable formula can be extremely dangerous under conditions that are known in the industry to occur.

The Fix-A-Flat tire inflator that Pandora and Pennzoil sold before February 18, 1999, was flammable; that is, it contained a formula that flamed and exploded. [3] Yet — in

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[3] Pennzoil initiated a nationwide recall of Fix-A-Flat on February 18, 1999, because of Fix-A-Flat's flammability and its potential to explode. (Pennzoil had been sued two months earlier by a widow whose husband had been decapitated in an explosion allegedly

violation of federal law — Pandora and Pennzoil never labeled their flammable Fix-A-Flat "Flammable." [4]

IQ and Pandora (and then Pennzoil) sold their competing tire inflators to retailers, who, in turn, sold these products to consumers. In other words, neither IQ nor Pandora (or Pennzoil) sold their competing tire inflators directly to consumers. Retailers were the market.

Major retailers were not purchasing tire inflators for sale to their customers (consumers) that were labeled "Flammable." Responsible retailers knew that flammable tire inflators were dangerous. The absence of a legally required "Flammable" label on a can of tire inflator conveyed the message to retailers that the product did *not* contain a flammable formula. The omission of the legally required "Flammable" label on Fix-A-Flat cans conveyed the false message to retailers that Fix-A-Flat was *not* flammable.

IQ asserted that Pandora's and Pennzoil's failure to label their flammable Fix-A-Flat "Flammable" constituted a "false or misleading description of fact" or a "false or misleading representation of fact" about Fix-A-Flat under section 43(a)(1)(B) of the Lanham Act. [5]

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caused by this flammable Fix-A-Flat).

[4] The Federal Hazardous Substances Act required that the Fix-A-Flat product at issue in this case be labeled "Flammable" on its cans because it was "flammable" under 16 C.F.R. § 1500.3(c)(6)(viii) (2002).

[5] 15 U.S.C. § 1125(a)(1)(B) (2002).

Pandora and Pennzoil moved for summary judgment, arguing that their omitted "Flammable" label could not (as a matter of law) constitute a "false or misleading description of fact" or a "false or misleading representation of fact" under the Lanham Act, even assuming (i) that federal law required the omitted label and (ii) that the omitted label conveyed a materially false message about Fix-A-Flat to retail purchasers. The district court granted this summary-judgment motion. [6] The Fifth Circuit affirmed. [7]

The district court's ruling on this pivotal (and purely legal) issue controlled the further disposition of this case, resulting in the district court's entry of a final summary judgment against IQ. [8] The district court excluded IQ's experts because they had relied in part in formulating and expressing their opinions on Pandora's and Pennzoil's failure to label Fix-A-Flat properly as "Flammable." [9] The district court then concluded that IQ — without this excluded expert testimony — lacked evidence of injury. [10] The Fifth Circuit affirmed the district court's exclusion of IQ's experts on the

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[6] App. E at 59a.

[7] App. A at 12a ("[W]e conclude that defendants' failure to label the product in keeping with FHSA regulations, even if true, does not constitute a false or misleading statement that is actionable under the Lanham Act.").

[8] App. B at 22a.

[9] App. C at 26a.

[10] App. D at 52a-53a.

same basis, which resulted in the Fifth Circuit's affirmation of the entire summary disposition of this case. [11]

REASONS FOR GRANTING THE PETITION

1. The Fifth Circuit's Decision Conflicts With and Confuses Decisions of Other Circuits.

Section 43(a)(1)(B) of the Lanham Act provides in pertinent part:

> "Any person who, on or in connection with any goods . . ., or container for goods, uses . . . any . . .
>
> false or misleading description of fact, or
>
> false or misleading representation of fact, —
>
> which . . . misrepresents the nature, characteristics [or] qualities of his or her goods . . .
>
> shall be liable in a civil action by any person who believes that he or she is likely to be damaged by such act." [12]

The Fifth Circuit (in reaching its erroneous legal conclusion that Pandora's and Pennzoil's "failure to label

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[11] App. A at 16a-18a.

[12] 15 U.S.C. § 1125(a)(1)(B) (2002).

[Fix-A-Flat] in keeping with FSHA regulations, *even if true*, does not constitute a false or misleading statement that is actionable under the Lanham Act" [13]) inaccurately analogized this case to three other Circuit Court of Appeals' decisions. [14]

To the extent that these three Circuit Court of Appeals' decisions provide guidance, they dictate a legal conclusion — applied to the facts of this case — directly contrary to the Fifth Circuit's legal conclusion. Not one of these three cases supports the Fifth Circuit's far-reaching legal conclusion as applied to the facts in this case. IQ analyzes these cases here in order of their decision.

First, in 1990, the Third Circuit decided *Sandoz*, [15] which concerned section 43(a) of the Lanham Act as it existed before "Congress [in 1988] redrafted section 43(a), sharpening the section's focus on false and deceptive advertising." [16] The *Sandoz* court defined the legal issue there as follows:

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[13] App. A at 12a (emphasis supplied).

[14] App. A at 9a-12a; *Mylan Labs., Inc. v. Matkari*, 7 F.3d 1130 (4th Cir. 1993), *cert. denied*, 510 U.S. 1197 (1994) (App. A at 9a-10a); *Sandoz Pharmaceuticals Corp. v. Richardson-Vicks, Inc.*, 902 F.2d 222 (3rd Cir. 1990) (App. A at 10a-11a); and *Dial A Car, Inc. v. Transportation, Inc.*, 82 F.3d 484 (D.C. Cir. 1996) (App. A at 11a). The Fifth Circuit concluded that "[t]his case is analogous to [these] three cases . . ., especially *Mylan*.") App. A at 12a.

[15] *Sandoz Pharmaceuticals Corp. v. Richardson-Vicks*, 902 F.2d 222 (3rd Cir. 1990).

[16] *ALPO Petfoods, Inc. v. Ralston Purina Co.*, 913 F.2d 958, 964 n.6 (D.C. Cir. 1990) (opinion by now Justice Thomas).

> "Our conclusions depend on the resolution of an interesting legal issue arising out of the interface between the Lanham Act and the Food, Drug and Cosmetic Act, *21 U.S.C.* §§ *301-92* (1982). The controversy centers on whether a Lanham Act plaintiff needs to show only that the defendant's advertising claims of its own drug's effectiveness are inadequately substantiated under FDA guidelines, or whether the plaintiff must also show that the claims are literally false or are misleading to the public. For the reasons that follow, we conclude that the additional proof that a defendant's claims are literally false or actually misleading is necessary to sustain a Lanham Act claim." [17]

In addressing the history of section 43(a) of the Lanham Act, the *Sandoz* court wrote:

> "After initial uncertainty as to the statute's reach, with some believing it to be little more than a codification of the common law action for deceitful advertising, it is now settled that it creates a new statutory tort of broader scope, which requires neither proof of literal or obvious falsehood, nor of intent to deceive.
>
> [Section] 43(a) of the Lanham Act encompasses more than blatant falsehoods. It embraces innuendo, indirect imitations, and ambiguous suggestions evidenced by the

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[17] *Sandoz*, 902 F.2d at 224.

consuming public's misapprehension of the hard facts underlying an advertisement." [18]

Importantly, the *Sandoz* court noted that "context can often be important in discerning the message conveyed and this is particularly true where, as here, the target of the advertising is not the consuming public but a more well informed and sophisticated audience." [19] The *Sandoz* court concluded: "Hence, a target audience's special knowledge of a class of products is highly relevant to any claim that it was misled by an advertisement for such a product." [20]

Significantly, *Sandoz* is not a summary judgment case. The district court had found "[a]fter an extensive hearing" that Sandoz "had failed to meet its burden of proving that any of Vicks's advertising claims was false." [21] The *Sandoz* court held that a Lanham Act plaintiff must show that advertising "claims are literally false or are misleading to the public," not merely that advertising claims "are inadequately substantiated under FDA guidelines." [22]

On the facts, the *Sandoz* court determined: "Assuming *arguendo* that false labeling is actionable under the Lanham

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[18] *Sandoz*, 902 F.2d at 227 (internal quotation marks and citations omitted).

[19] *Id.* at 229 (citation omitted).

[20] *Id.* at 229-30.

[21] *Sandoz*, 902 F.2d at 224.

[22] *Id.* at 229.

Act, Sandoz cannot prevail on its labeling claim because it has not proved that Vicks's labeling is false." [23]

The *Sandoz* court wrote that it was "unable to conclude that Vicks's labeling of Pediatric 44's demulcents as inactive [was] literally false" because the *"FDA has not found conclusively that demulcents must be labelled as active or inactive ingredients within the meaning of 21 C.F.R. § 210.(3)(b)7."* [24] The *Sandoz* court was understandably unwilling "to usurp administrative agencies' responsibility for interpreting and enforcing potentially ambiguous regulations." [25]

Here, the facts are entirely different. Congress has determined *conclusively* that a flammable aerosol product — Fix-A-Flat — must be labeled "Flammable." Pennzoil has never argued — and neither the district court nor the Fifth Circuit found — that the regulations mandating this "Flammable" labeling are ambiguous or potentially ambiguous. Unlike *Sandoz*, this case does not require an original court interpretation concerning the applicability of an agency-enacted regulation.

Here, Pandora's and Pennzoil's failure to label their flammable Fix-A-Flat "Flammable" as required by federal law does constitute a false or misleading description of fact or a false or misleading representation of fact. The omission conveyed the false message to the targeted audience of

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[23] *Id.* at 230.

[24] *Sandoz*, 902 F.2d at 230-31 (emphasis supplied).

[25] *Id.* at 31.

retailers that Fix-A-Flat was not flammable and thus did not require the "Flammable" label.

The *Sandoz* court never suggested, hinted, or held that the omission of a required warning label that conveys a false message about a product can never constitute (as a matter of law) a "false or misleading description of fact" or a "false or misleading representation of fact" under § 43(a)(1) of the Lanham Act. To the contrary, the *Sandoz* court emphasized the importance of context in discerning the message conveyed, particularly where "the target of the advertising is not the consuming public but a more well informed and sophisticated audience." [26] The targeted audience in this case — the retailers to whom IQ, Pandora, and Pennzoil sold their tire-inflator products — understood that the absence of a "Flammable" warning label on the can meant that the product was not flammable under federal warning-label law, a patently false message as related to the flammable Fix-A-Flat.

Second, in 1993, the Fourth Circuit decided *Mylan*. [27] Two points about *Mylan* are important and relevant here.

One, *Mylan* did not concern or decide the legal effect under the Lanham Act of a false message conveyed by an omission in labeling or advertising. The *Mylan* court noted:

> "[T]here simply are no allegations of 'material omissions' in the complaint. Accordingly, even if these omissions created a cause of action under the Lanham Act -- a matter hotly

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[26] *Sandoz*, 902 F.2d at 229 (citation omitted).

[27] *Mylan Labs, Inc. v. Matkari*, 7 F.3d 1130 (4th Cir. 1993).

> disputed by the appellees -- it has no bearing in the instant case in light of the failure to plead such a claim." [28]

Two, in *Mylan*, the defendants had placed a generic drug on the market that did *not* require FDA approval "with standard package inserts often used for FDA-approved drugs." [29] The defendants, however, had never claimed that their generic drug was FDA-approved. Mylan — the Lanham Act plaintiff — argued that the defendants' use of these standard package inserts often used for FDA-approved drugs falsely implied that the defendants' drugs had been FDA-approved.

The *Mylan* court found that "Mylan's claims that the defendants' falsely advertised that their drugs had been 'properly approved by the FDA' must fail" because the defendants' advertising had never claimed "proper FDA approval." [30] The *Mylan* court concluded "that the very act of placing a drug on the market, with standard inserts often used for FDA-approved drugs" does *not* falsely imply that "the drug had been properly approved by the FDA." [31]

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[28] *Mylan*, 7 F.3d at 1138 n.9. Here, IQ pleaded specifically that Pandora's and Pennzoil's omission in failing to label their flammable Fix-A-Flat "Flammable" as required by federal law constituted a "false or misleading description of fact" or a "false or misleading representation of fact" about Fix-A-Flat under the Lanham Act.

[29] *Mylan*, 7 F.3d at 1139.

[30] *Id.*

[31] *Id.*

Hence, no false advertising existed in *Mylan*, through affirmative misrepresentation, material omission, or otherwise.

Again, the present case differs materially. Here, the omission of the "Flammable" label from the flammable Fix-A-Flat cans conveyed the false message to retailers that Fix-A-Flat was not flammable because retailers knew that federal law required a flammable product to be labeled "Flammable."

Third, in 1996, the D.C. Circuit decided *Dial A Car*. [32] The *Dial A Car* court upheld the district court's dismissal of a Lanham Act claim on the ground that the challenged representations were not provably false because the D.C. Taxicab Commission had not yet *interpreted* the controlling municipal regulation. [33] The court found that it was not clear whether the regulation at issue even *applied* to Blue Car service.

Importantly, the *Dial A Car* court wrote:

> "We agree with the dissent that, hypothetically speaking, a regulation might conceivably be drafted that would be so clear on its face that no good faith doubt concerning its interpretation would be possible, even without an explicit statement from the Taxicab Commission." [34]

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[32] 82 F.3d 484 (D.C. Cir. 1996) (2 to 1 decision).

[33] *Dial A Car*, 82 F.3d at 488-89.

[34] *Id.* at 489 n. 3. *See, also, Coastal Abstract Serv., Inc. v. First Am. Title Ins. Co.*, 173 F.3d 725, 731-32 (9th Cir. 1999) and

The present case does not involve the same or similar issues of interpretation or application of a regulation that the *Dial A Car* court addressed. Here, federal labeling law unquestionably applied and unambiguously required that the flammable Fix-A-Flat be labeled "Flammable" (which it was not). Thus, under the facts here, *Dial A Car* suggests that IQ has asserted a valid Lanham Act claim stemming from a false or misleading message about Fix-A-Flat derived from the omission of a legally mandated warning label: "Flammable." [35]

In short, neither *Sandoz* nor *Mylan* nor *Dial A Car* supports the Fifth Circuit's far-reaching and erroneous legal conclusion that the omission of a legally required warning label from a self-pressurized aerosol product (sold in a can) can *never* — as a matter of law — constitute a "false or misleading description of fact" or a "false or misleading representation of fact" under the Lanham Act, regardless of the false message that the omission conveys. Succinctly put, the Fifth Circuit's emasculation of the Lanham Act in this case is unprecedented.

2. The Fifth Circuit's Decision Is Incorrect.

IQ understands that it must prove five elements to prevail on its false advertising claims under section

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Global Discount Travel Servs., LLC v. Trans World Airlines, Inc., 960 F.Supp. 701, 706-07 (S.D.N.Y. 1997) (both of which discuss *Sandoz* and *Dial A Car*).

[35] *Dial A Car*, 82 F.3d at 489 n.3.

43(a)(1)(B) of the Lanham Act. [36] As applied to this case, these five elements are:

1. a false or misleading description of fact or a false or misleading representation of fact about Fix-A-Flat that misrepresented Fix-A-Flat's nature, characteristics, or qualities ("Element 1");

2. that such false or misleading description of fact or false or misleading representation of fact either deceived, or had the capacity to deceive, a substantial segment of potential retailers ("Element 2");

3. that the deception was material, in that it was likely to have influenced the retailer's purchasing decision ("Element 3");

4. that Fix-A-Flat was in interstate commerce ("Element 4"); and

5. that IQ has been or is likely to be injured as a result of the false or misleading description of fact or the false or misleading representation of fact at issue ("Element 5").

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[36] *Pizza Hut, Inc. v. Papa John's Int'l, Inc.*, 227 F.3d 489, 495 (5th Cir. 2000), *cert. denied*, 532 U.S. 920 (2001).

IQ submits that Pandora's and Pennzoil's failure to label the flammable Fix-A-Flat "Flammable" as required by federal law (thereby conveying a false message to retailers that Fix-A-Flat was *not* flammable) satisfies Element 1 of its Lanham Act claims. IQ has never asserted that it automatically prevails by proving only Element 1 of its Lanham Act claims.

Yet, the district court and the Fifth Circuit erroneously concluded that IQ is attempting to assert an unauthorized private right of action under the Federal Hazardous Substances Act for Pandora's and Pennzoil's failure to label the flammable Fix-A-Flat "Flammable." [37] IQ is not. IQ does not seek to enforce the Federal Hazardous Substances Act through an impermissible private right of action. To the contrary, IQ seeks only to enforce the private right of action that Congress expressly afforded when Congress enacted the Lanham Act.

The legal issue in this case concerns only Element 1 of IQ's Lanham Act claims. It is undisputed here that federal law requires that a flammable aerosol product be labeled "Flammable" on the can. The flammable Fix-A-Flat was *not* labeled "Flammable."

With regard only to Element 1 of IQ's Lanham Act claim, the legal issue is whether the omission of the required

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[37] The Consumer Product Safety Commission never issued a finding concerning whether the Fix-A-Flat product at issue in this case was or was not flammable under 16 C.F.R. § 1500.3(c)(6)(viii) (2002). For analytical purposes, the Fifth Circuit assumed correctly that the Fix-A-Flat product at issue was flammable and was not labeled "Flammable" as required by federal law.

"Flammable" label from the Fix-A-Flat cans does (or can legally ever) constitute a "false or misleading description of fact" or a "false or misleading representation of fact" under the Lanham Act, assuming (i) that the omission conveys the false message to its intended audience that Fix-A-Flat was *not* flammable and (ii) that IQ can prove the remaining four elements of its Lanham Act claims. The Fifth Circuit seriously erred in framing and deciding this issue.

The Fifth Circuit concluded erroneously that Pandora's and Pennzoil's failure to label the flammable Fix-A-Flat "Flammable" in "keeping with FHSA regulations, *even if true*, does not constitute a false or misleading statement that is actionable under the Lanham Act." [38] Yet, the Fifth Circuit fails to state any specific reasons for its implicit conclusion that Pandora's and Pennzoil's omission of the required "Flammable" label does not (and cannot as a matter of law) satisfy Element 1 of IQ's Lanham Act claim, when the omission (in context) conveyed the false message to retailers that Fix-A-Flat was not flammable.

As shown, the Fifth Circuit flatly misplaced its reliance on *Sandoz*, *Mylan*, and *Dial A Car*. Pandora's and Pennzoil's failure to label the flammable Fix-A-Flat "Flammable" conveyed to retailers a "false or misleading description of fact" or a "false or misleading representation of fact" about Fix-A-Flat because retailers understood that a flammable product was required to be labeled "Flammable" on the can. The Lanham Act simply does not exempt (or grant immunity to) a material omission that conveys a false or misleading message about a product.

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[38] App. A at 12a (emphasis supplied).

3. The Question Presented Is Important.

This Court has acknowledged that "[t]he Lanham Act was intended to make actionable the deceptive and misleading use of marks *and to protect persons engaged in commerce against unfair* competition." [39] Ever since its 1946 enactment, the Lanham Act has proscribed false advertising. As Justice Stevens wrote in his concurring opinion in *Two Pesos*:

> "The deleterious effects of false advertising were described by one commentator as follows:
>
> '[A] campaign of false advertising may completely discredit the product of an industry, destroy the confidence of consumers and impair a communal or trade good will.
>
> Less tangible but nevertheless real is the injury suffered by the honest dealer who finds it necessary to meet price competition of inferior goods, glamorously misdescribed by the unscrupulous merchant.
>
> The competition of a liar is always dangerous even though the exact injury may not be susceptible of precise proof." [40]

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[39] *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 767-68 (1992) (internal quotation marks and citations omitted).

[40] *Two Pesos*, 505 U.S. at 778-79 n.4 (Stevens, J., concurring) (quoting Handler, Unfair Competition, *21 Iowa L. Rev. 175, 193*

Likewise, courts have often emphasized the importance of section 43(a) of the Lanham Act in deterring false advertising of any nature. For example, in *Coca-Cola Co. v. Proctor & Gamble Co.*, [41] the Sixth Circuit wrote:

> "The language of the Act, the proper starting point for any statutory interpretation, includes the following phrase: '*any* false description or representation.'
>
> The plain meaning of that statutory phrase clearly encompasses a false description or misrepresentation about the characteristics or qualities or overall quality of a product.
>
> * * *
>
> In addition to the plain language of the statute and other courts' interpretations supporting what we believe is a common sense application, policy considerations are implicated in this case.
>
> P&G observes that the advertising industry is a self-policing industry that considers claims of misrepresentations of quality, and P&G argues that federal courts need not, and should not, be bogged down with detailed claims of false advertising.

(1936)).

[41] 822 F.2d 28 (6th Cir. 1987).

> Congress, however, has enacted a statute that creates a cause of action in federal court for false advertising.
>
> Protecting consumers from false or misleading advertising, moreover, is an important goal of the statute and a laudable public policy to be served.
>
> Under our economic system, competitors have the greatest interest in stopping misleading advertising, and a private cause of action under section 43(a) allows those parties with the greatest interest in enforcement, and in many situations with the greatest resources to devote to a lawsuit, to enforce the statute rigorously.
>
> Public policy, therefore, is indeed well served by permitting misrepresentation of quality claims to be actionable under section 43(a)." [42]

Further, the Ninth Circuit stressed — in connection with its Lanham Act analysis — in *U-Haul Int'l, Inc. v. Jartran, Inc.*, [43] that:

> "Quite clearly, the Congressional intent was to allow a private suit by a competitor to stop the kind of unfair competition that consists of lying about goods or services, when it occurs in interstate commerce.

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[42] *Coca-Cola*, 822 F.2d at 31 (internal citation omitted).

[43] 681 F.2d 1159 (9th Cir. 1982).

* * *

> Unlike prior law, the Lanham Act is directed toward protecting the consumer as well as the competitor from false and deceptive advertising." [44]

In 1988, "Congress redrafted section 43(a) [of the Lanham Act], *sharpening its focus on false and deceptive advertising*." [45] The Senate Report that accompanied these 1988 amendments emphasized with approval that "[s]ection 43(a) of the Act fills an important gap in federal unfair competition law [and] has been widely interpreted as creating, in essence, a federal law of unfair competition." [46]

Recent developments involving Enron, Arthur Andersen, and WorldCom (among others) have focused public awareness on the ever-present need for integrity in America's competitive marketplace. The Lanham Act's express anti-false-advertising provisions give teeth to a competitor who seeks to ensure honest competition.

Pandora and Pennzoil engaged in patently unfair competition by failing to label their flammable Fix-A-Flat "Flammable," thereby conveying a false message about Fix-

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[44] *U-Haul*, 681 F.2d at 1162 (internal quotation marks and citations omitted).

[45] *ALPO Petfoods, Inc. v. Ralston Purina Co.*, 913 F.2d 958, 964 n.6 (D.C. Cir. 1990) (emphasis supplied) and Trademark Law Revision Act of 1988 (1988 Act), Pub. L. No. 100-667, sec. 132, § 43(a), 102 Stat. 3935, 3946 (amending *15 U.S.C. § 1125(a)*).

[46] S. Rep. No. 100-515, p. 40 (1988).

A-Flat to Fix-A-Flat purchasers. This false message — conveyed through a material omission that violated the same federal warning-label law that governs all tire-inflator manufacturers, including IQ — rightfully constitutes a "false or misleading description of fact" or a "false or misleading representation of fact" about Fix-A-Flat under the explicit language, the plain meaning, and clear intent of the Lanham Act.

This Court has never decided a Lanham Act false-advertising case, either before or after the 1988 amendments. [47] The far-reaching legal and policy implications of the Fifth Circuit's erosion of the Lanham Act in this case beg for this Court to bring the corrected clarity and focus to these important Lanham Act issues that only this Court can (and should) do.

CONCLUSION

Because the Fifth Circuit's unprecedented decision in this case erroneously emasculates the important private right of action expressly afforded by Congress in the Lanham Act, conflicts with and confuses other Circuit decisions, and is incorrect, IQ prays that this Court grant its petition for a writ of certiorari.

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[47] *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763 (1992) is a Lanham Act case involving trade dress, not a Lanham Act false advertising case.

Respectfully submitted,

Kenneth M. Morris
Counsel of Record
Attorney for Petitioner
600 Jefferson, Suite 800
Houston, Texas 77002
Telephone: (713) 659-8697
Facsimile: (713) 659-3020

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 01-20764

[Filed September 23, 2002]

IQ PRODUCTS COMPANY,
Plaintiff-Intervenor Defendant-Counter
Claimant-Appellant,

v.

PENNZOIL PRODUCTS COMPANY,
Intervenor Plaintiff-Counter
Defendant-Appellee,

v.

PANDORA MANUFACTURING
INCORPORATED, also known as
Snap Products, Incorporated,
Defendant-Appellee.

Appeal from the United States District Court
For the Southern District of Texas
H-99-CV-1909
Melinda Harmon, US District Judge

JUDGES:
Before DAVIS, DeMOSS, and STEWART, Circuit Judges.

OPINION

W. EUGENE DAVIS, Circuit Judge:

Plaintiff IQ Products Co. brought suit against defendants Pandora Manufacturing, Inc. (formerly known as Snap Products, Inc.) and Pennzoil Products Co., alleging that defendants falsely advertised their competing tire inflator product, Fix-A-Flat, in violation of the Lanham Act. The district court granted summary judgment in favor of defendants. For the reasons given below, we affirm.

I.

This case involves competing tire inflator products. Plaintiff IQ Products Co. ("IQ") manufactures tire inflators under the brand names Repair Safe, AirUp, and Primis. Defendant Pandora Manufacturing, Inc. (formerly known as Snap Products, Inc.) and later defendant Pennzoil Products Co. ("Pennzoil") manufactures a competing tire inflator called Fix-A-Flat.[1] IQ alleges that from early 1994 to February 18, 1999, the defendants failed to label the product as "flammable" and falsely advertised Fix-A-Flat as "non-explosive" in violation of the Lanham Act. Accordingly, IQ argues that it is entitled to lost profits, disgorgement of defendants' ill-gotten profits, and attorneys' fees.

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[1] The parties sell these tire inflators to retailers, not directly to consumers.

A tire inflator is a can of chemicals under pressure that a motorist uses to repair a leak in an automobile tire until a more permanent repair or replacement can be made. A motorist uses a tire inflator to inject pressurized gas into a tire to inflate it and also to patch the leak with a liquid sealant. Tire inflators may be dangerous if their formula is flammable or explosive because repairmen making permanent repairs to damaged tires use metal tools and occasionally weld wheel rims while working on damaged tires. These activities may create sparks, which can cause a fire or explosion.

Snap Products began manufacturing and marketing Fix-A-Flat in 1990. In early 1994, Snap introduced a new formula of Fix-A-Flat, which is at issue in this lawsuit. IQ contends that this generation of Fix-A-Flat was both flammable and explosive. On November 4, 1997, Snap sold Fix-A-Flat and its "Snap" trade name to Pennzoil.[2] Pennzoil continued to sell Snap's 1994 formula of Fix-A-Flat until January 1998, when Pennzoil slightly modified the formula. Both parties agree that this slight change did not significantly alter the flammability or explosiveness of the product for purposes of this lawsuit. Pennzoil continued to sell this slightly modified version of Fix-A-Flat until February 18, 1999, when it recalled the product and began selling a new formula of Fix-A-Flat.

IQ argues that from early 1994 to February 18, 1999, the Fix-A-Flat formula was flammable and explosive.[3]

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[2] Snap changed its name to Pandora on February 1, 1998.

[3] Because of a release executed between IQ and Pandora in a prior suit, IQ's claims are limited to the period of March 25,

Nevertheless, IQ alleges that the defendants failed to label Fix-A-Flat properly as "flammable" or "extremely flammable" as required by federal law. IQ also maintains that the defendants falsely advertised that Fix-A-Flat was "non-explosive."

IQ brought suit against Snap in June 1998, alleging that the defendants' false advertising violated the Lanham Act. Pandora (Snap's new corporate name) filed an answer and counterclaim against IQ. In August 1998, Pennzoil intervened and filed a complaint against IQ. IQ then counterclaimed against Pennzoil.

The district court granted the defendants' motion for partial summary judgment on March 13, 2001. The district court concluded that (1) IQ's claims that the defendants falsely advertised Fix-A-Flat as non-flammable were limited to the defendants' alleged failure to label Fix-A-Flat properly as "flammable;" and (2) so construed, IQ's flammability claims did not survive summary judgment. On July 5, 2001, the district court granted final summary judgment for the defendants on the remaining issues. IQ now appeals.

II.

IQ first argues that the district court erred by granting summary judgment for the defendants on IQ's claims that the defendants falsely advertised Fix-A-Flat as "non-flammable"

1997 through February 18, 1999. IQ does not contend that the formulation of Fix-A-Flat that Pennzoil began marketing after February 18, 1999 is falsely labeled or advertised.

in violation of the Lanham Act. We review the district court's grant of summary judgment de novo.[4]

As an initial matter, we must resolve whether the district court properly limited IQ's claims to the defendants' failure to label Fix-A-Flat cans as "flammable." IQ maintains that its complaint should not be so narrowly construed, but should be read to allege that the defendants also affirmatively advertised Fix-A-Flat as "non-flammable."

The district court rejected this argument in its March 13, 2001 order granting partial summary judgment to the defendants and later clarified its holding in its July 5, 2001 order. The district court reasoned that:

> IQ never pled any claims related to flammability under the Lanham Act other than the failure to label the Fix-A-Flat can. IQ never amended its pleading to expand its claim to include other affirmative representations of non-flammability. Discovery has long been closed, trial is imminent, and the time has passed when such an amendment would not be severely prejudicial to Defendants.[5]

After reviewing the record, we agree. IQ's complaint nowhere alleges that the defendants affirmatively

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[4] *See Blow v. City of San Antonio*, 236 F.3d 293, 296 (5th Cir. 2001).

[5] R. at 1809-10.

misrepresented Fix-A-Flat as "non-flammable." On the contrary, the complaint states, in relevant part, that:

> These misrepresentations have occurred because (i) Snap has not-as required by federal law-labeled its Fix-A-Flat as "Flammable," thereby falsely representing that Fix-A-Flat is "non-flammable" when, indeed, it is not; and (ii) Snap has falsely represented Fix-A-Flat as containing a "Non-Explosive Formula."[6]

Admitting that it never expressly alleged that the defendants affirmatively represented that Fix-A-Flat was "non-flammable," IQ urges this court to interpret the term "non-explosive," as used in the complaint, to include within its scope the term "non-flammable." This argument is unpersuasive. Throughout its complaint, IQ consistently treats its claims that the defendants failed to label Fix-A-Flat as "flammable" and that they affirmatively advertised the product as "non-explosive" as two distinct concepts. Moreover, while the two terms are related, they are not mutually exclusive; significantly, according to the ordinary understanding of the terms, material may be flammable--that is, tend to burn--while not being explosive.[7] Given the lack of

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[6] R. at 4.

[7] Webster's Third New International Dictionary defines "flammable" as "capable of being easily ignited and of burning with extreme rapidity." Webster's Third New International Dictionary 864 (1993). It defines "explosive" as "relating to, characterized or operated by, or suited to cause explosion." *Id.* at 802. "Explosion," in turn, is defined as "a violent expansion or

any assertion in the complaint that the defendants made affirmative misrepresentations that Fix-A-Flat was "non-flammable" and IQ's failure to amend its complaint in a timely fashion, we conclude that the district court correctly limited IQ's flammability claims to the defendant's alleged failure to label the Fix-A-Flat cans as "flammable."

IQ next argues that the district court improperly granted summary judgment for the defendants on its claims that the defendants failed to properly label Fix-A-Flat as "flammable" or "extremely flammable" as required by federal law. IQ asserts that the omission of the word "flammable" from Fix-A-Flat's label misled consumers into believing that the product had passed the federally-mandated flame extension test required under 16 C.F.R. § 1500.3(c)(6)(vii).

The Lanham Act imposes liability on "any person who . . . uses in commerce any . . . false or misleading description of fact, or false or misleading representation of fact, which . . . in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his

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bursting that is accompanied by noise and is caused by a sudden release of energy from a very rapid chemical reaction, from a nuclear reaction, or from an escape of gases or vapors under pressure." *Id.*

In absence of technical expert testimony giving a specialized technical meaning of a term, we use its ordinary meaning. IQ offered no expert testimony tending to support the argument it now advances-i.e. that all flammable materials are explosive and vice versa.

or her or another person's goods, services, or commercial activities."[8] As explained more fully below, the district court granted summary judgment for the defendants on IQ's failure to label claims primarily because it reasoned that IQ was attempting to use the Lanham Act to circumvent the Federal Hazardous Substances Act ("FHSA").[9] A brief overview of federal regulation of hazardous substances is therefore appropriate.

The FHSA establishes a comprehensive scheme of product regulation and labeling.[10] The Consumer Product Safety Commission ("CPSC") is responsible for enforcing the FHSA and promulgating, interpreting, and enforcing regulations under the FSHA.[11] The CPSC has the discretion to exempt substances from the FHSA's full requirements[12] and to determine whether to prosecute FHSA violations.[13] The FHSA does not authorize a private cause of action.

Since 1994, IQ has complained about Fix-A-Flat to the Federal Trade Commission ("FTC") and the CPSC. The FTC referred IQ's complaint to the National Highway Traffic Safety Administration, which declined to take any regulatory

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[8] 15 U.S.C. § 1125(a)(1)(B) (2002).

[9] 15 U.S.C. § § 1261-78 (2002).

[10] *Id.*

[11] *Id.*

[12] 15 U.S.C. § 1262.

[13] 16 C.F.R. § 1009.8.

action. Likewise, the CPSC investigated and refused to take further action.

The district court granted partial summary judgment for the defendants on IQ's failure to label claims in its March 13, 2001 order. The district court explained that by bringing a Lanham Act claim against defendants for failing to properly label Fix-A-Flat, "IQ is impermissibly attempting to circumvent the FHSA by converting the Lanham Act into a vehicle to enforce the FHSA, which bars private actions, and to usurp the regulatory function of the CPSC here."[14] In reaching this conclusion, the district court relied on three cases, which we discuss below.

First, in *Mylan Laboratories, Inc. v. Matkari*,[15] the plaintiff drug manufacturer brought a Lanham Act claim against a competing drug manufacturer and its officers, alleging that the defendants' use of package inserts, brochures, and advertisements violated the Lanham Act because these materials falsely represented or implied that the drugs had been approved by the FDA. The Fourth Circuit affirmed the district court's dismissal of the case under Rule 12(b)(6).[16] The court explained that the plaintiff did not allege that the defendants affirmatively represented that the drugs were "FDA-approved."[17] The court further reasoned that:

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[14] R. at 1312.

[15] 7 F.3d 1130, 1137-39 (4th Cir. 1993)

[16] *Id.*

[17] *Id.* at 1139.

> . . . That fatal deficiency cannot be cured by contentions that the very act of placing a drug on the market, with standard package inserts often used for FDA-approved drugs, somehow implies (falsely) that the drug had been "properly approved by the FDA." Such a theory is, quite simply, too great a stretch under the Lanham Act. We agree with the defendants that permitting Mylan to proceed on the theory that the defendants violated § 43(a) merely by placing their drugs on the market would, in effect, permit Mylan to use the Lanham Act as a vehicle by which to enforce the Food, Drug, and Cosmetic Act . . . .

Mylan, in short, is not empowered to enforce independently the FDCA. . . .[18]

Similarly, in *Sandoz Pharmaceuticals Corp. v. Richardson-Vicks*,[19] the plaintiff, who manufactured children's cough syrup, alleged that its competitor violated the Lanham Act by mislabeling one of its ingredients as "inactive." The Third Circuit affirmed the district court's denial of a preliminary injunction.[20] The court stated that the FTC and

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[18] *Id.* (emphasis in original).

[19] 902 F.2d 222, 230-32 (3rd Cir. 1990).

[20] *Id.*

the FDA heavily regulate drug labeling requirements.[21] The court reasoned that "neither of these agencies' constituent statutes creates an express or implied private right of action and what the FD&C Act and the FTC Act do not create directly, the Lanham Act does not create indirectly, at least not in cases requiring original interpretation of these Acts or their accompanying regulations."[22]

Finally, in *Dial A Car, Inc. v. Transportation, Inc.*,[23] the plaintiff limousine service brought suit against taxi cab companies, alleging that the companies misrepresented that they were allowed to provide corporate account transportation services outside their counties of licensure. The D.C. Circuit affirmed the district court's dismissal of the plaintiff's claims under the Lanham Act.[24] The court explained that this question was within the jurisdiction of the local Taxicab Commission.[25] Citing Sandoz, the court explained that "by entertaining appellant's claim, we would be transforming the Lanham Act into a handy device to reach and decide all sorts of local law questions."[26]

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[21] *Id.* at 231.

[22] *Id.* at 231 (internal citations omitted).

[23] 317 U.S. App. D.C. 240, 82 F.3d 484, 488-90 (D.C. Cir. 1996).

[24] *Id.*

[25] *Id.* at 488.

[26] *Id.* at 490.

This case is analogous to the three cases discussed above, especially *Mylan*. Like the Food, Drug and Cosmetic Act (at issue in *Mylan* and *Sandoz*), the FHSA does not create a private cause of action. Rather, the FHSA vests the CPSC with the authority to enforce federal labeling requirements. In this case, the CPSC was aware of Fix-A-Flat's alleged labeling deficiencies but took no action. As a result, IQ essentially seeks to enforce the labeling requirements of the FHSA-an action which the CPSC, the enforcing agency, declined to do. For these reasons, we conclude that the defendants' failure to label the product in keeping with FHSA regulations, even if true, does not constitute a false or misleading statement that is actionable under the Lanham Act. Thus, we hold that the district court correctly granted summary judgment for the defendants on IQ's claims that the defendants failed to label its product as flammable.

III.

IQ next argues that the district court erred by granting summary judgment for the defendants on its claims that the defendants falsely advertised Fix-A-Flat as "non-explosive" when, in fact, they knew that this was not true. This court reviews the district court's grant of summary judgment *de novo*.[27]

As stated above, § 43(a) of the Lanham Act provides, in relevant part:

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[27] *See Blow v. City of San Antonio*, 236 F.3d 293, 296 (5th Cir. 2001).

> Any person who . . . uses . . . any . . . false or misleading description of fact, or false or misleading representation of fact, which . . misrepresents the nature, characteristics, [or] qualities . . . of his or her or another person's goods . . . shall be liable in a civil action by any person who believes that he or she is likely to be damaged by such act.[28]

The plaintiff must establish five elements to make out a *prima facie* case of false advertising under the Lanham Act:

(1) A false or misleading statement of fact about a product;

(2) Such statement either deceived or had the capacity to deceive a substantial segment of potential consumers;

(3) The deception was material, in that it is likely to influence the consumer's purchasing decision;

(4) The product is in interstate commerce; and

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[28] 15 U.S.C. § 1125(a).

(5) The plaintiff has been or is likely to be injured as a result of the statement at issue.[29]

"The focus of the Lanham Act is on commercial interests [that] have been harmed by a competitor's false advertising."[30] To obtain money damages for false advertising under § 43(a) of the Lanham Act, the plaintiff must first demonstrate that the advertisement was (1) literally false; or (2) likely to mislead and confuse customers.[31] If the statement at issue is shown to be literally false, the court must assume that it actually misled consumers, without requiring any evidence of such deception from the plaintiff.[32] If the statement is shown to be misleading or ambiguous, however, the plaintiff must demonstrate actual deception through direct evidence of consumer reaction to the advertising or evidence of consumer surveys or consumer reaction tests.[33]

IQ alleges that the defendants made several false or misleading statements that falsely advertised Fix-A-Flat as "non-explosive." First, IQ alleges that the defendants affirmatively misrepresented that the product was "non-

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[29] *Pizza Hut, Inc. v. Papa John's Int'l, Inc.*, 227 F.3d 489, 495 (5th Cir. 2000).

[30] *Procter & Gamble Co. v. Amway Corp.*, 242 F.3d 539, 563 (5th Cir. 2001) (internal quotation marks and citation omitted).

[31] *See Pizza Hut*, 227 F.3d at 495.

[32] *Id.* at 497.

[33] *Id.*

explosive," a statement that IQ maintains was literally false. In addition, IQ points out other statements that the defendants made that, while not literally false, were misleading and deceptive to consumers.[34]

The district court granted summary judgment for the defendants with respect to all of the contested statements. The district court first found that the defendants' advertisement of Fix-A-Flat as "non-explosive" was not literally false, and therefore, actual deception and materiality could not be presumed. The court then explained that the summary judgment evidence did not establish any actual deception or materiality as to any of the contested statements.

IQ argues that the district court erred in finding that the statement that Fix-A-Flat was "non-explosive" was not literally false. IQ points to the testimony of its expert, Dr. John Jacobus to support its position. Dr. Jacobus reported that he had tested Fix-A-Flat formula at issue and found that it was explosive under some circumstances.

Even if the district court erred in finding that IQ failed to present a genuine issue of material fact on the literal falsity of the defendants' statement that Fix-A-Flat was "non-

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[34] Specifically, IQ alleges that the defendants made the following misleading statements: "Do NOT use with other tire inflator products. Other products may contain explosive gases which could cause injury to you or a tire repair professional;" and "DO NOT WELD ON A RIM WITHOUT FIRST REMOVING THE TIRE FROM THE RIM. FAILURE TO DO SO COULD CAUSE THE TIRE TO EXPLODE REGARDLESS OF WHETHER THE TIRE INFLATOR IS USED."

explosive," which we do not decide, IQ failed to produce competent summary judgment evidence that it was harmed by the defendants' allegedly false and misleading advertisement. IQ presented no competent summary judgment evidence that indicates that consumers would have bought IQ's tire inflator products instead of Fix-A-Flat in the absence of the defendants' allegedly false and misleading statements.

IQ responds that the testimony of two of its expert witnesses, Dr. Al E. Birdwell and Yohanne Gupta, establish that IQ suffered actual harm. IQ contends that the district court improperly excluded the testimony of both witnesses under Federal Rule of Evidence 702. Dr. Birdwell gave opinions on the materiality of defendants' false statements (i.e.-the effect on the buying decisions of consumers) and the damage to IQ as a result. The magistrate judge excluded Dr. Birdwell's testimony under Rule 702 because it was based on "insufficient data" and "unreliable methodology."[35] The magistrate judge explained that Dr. Birdwell's opinions were based on the combined effect of the defendants' failure to label their product as flammable and the representation that Fix-A-Flat was "non-explosive."[36] The judge reasoned that the flammability issue was no longer in the case, and therefore, was irrelevant. The judge also found that Dr. Birdwell did not conduct any market or survey research or any data that could be subject to testing and verification.[37]

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[35] R. at 1565; *see Daubert v. Merrell Dow Pharms.*, Inc., 509 U.S. 579, 125 L. Ed. 2d 469, 113 S. Ct. 2786 (1993).

[36] R. at 1565.

[37] R. at 1564.

The district court also excluded testimony of Yohanne Gupta, IQ's CEO, essentially for the same reasons as Dr. Birdwell. The magistrate judge reasoned (and the district court subsequently adopted the reasoning) that Gupta had no reliable basis for his opinion that "consumers would have purchased [IQ's] products instead of Fix-A-Flat if Fix-A-Flat had been properly labeled."[38] Gupta offered no market research or tests to support his opinions. Instead, he based his opinion on "common sense."[39]

This court reviews rulings on the admissibility of expert evidence for abuse of discretion.[40] Based on our review of the record, we cannot say that the district court abused its discretion in excluding the testimony of Dr. Birdwell and Gupta. Neither expert conducted reliable survey or market research, commonly employed by market analysts, to support their conclusions that consumers would have purchased IQ's tire inflators were it not for the defendants' allegedly misleading statements about the explosiveness of the product.[41] Furthermore, both witnesses' opinions describe the effect of the combination of defendants' failure to label the

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[38] R. at 1563.

[39] R. at 1563.

[40] *See St. Martin v. Mobil Exploration & Producing U.S. Inc.*, 224 F.3d 402, 405 (5th Cir. 2000).

[41] *See, for example, Pizza Hut, Inc. v. Papa John's Int'l, Inc.*, 227 F.3d 489, 497 (5th Cir. 2000) (explaining that "the plaintiff may not rely on the judge or the jury to determine, 'based solely upon his or her intuitive reaction, whether the advertisement is deceptive.'") (internal citation omitted).

product as flammable and advertisement of it as non-explosive. Neither expert testified about what effect, if any, the defendants' advertisement of Fix-A-Flat as "non-explosive" had on IQ independent of the flammability issue. It follows that the experts' opinions were flawed because they based their conclusions in part on the failure to label claims which the district court correctly rejected. For these reasons, we conclude that the district court did not err in granting the defendants' motion for summary judgment on IQ's claims that the defendants falsely advertised Fix-A-Flat as "non-explosive."[42]

IV.

Finally, IQ contends that it is entitled to a new trial because 28 U.S.C. § 455(b)(5)(iii) and 28 U.S.C. § 455(a) mandated the district judge's disqualification. Specifically, IQ maintains that because Judge Harmon's father-in-law was a retired partner of Baker Botts, the firm that represented Pennzoil, she was required to recuse herself.

Section 455(b)(5)(iii) provides that a United States judge "shall" disqualify himself when "he or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person . . . is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding." In Potashnick v. Port City

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[42] IQ raises a number of other evidentiary objections to the court's refusal to consider various summary judgment evidence. We have considered these objections and conclude that even if the district court erred, it had no effect on the correctness of its ruling.

Construction Co.,[43] the district judge declined to disqualify himself from a case in which the lawyer for one of the parties was the law partner of the judge's father. This court held that the district judge should have recused himself under § 455(b)(5)(iii).[44] The court stated that "when a partner in a law firm is related to a judge within the third degree, that partner will always be 'known by the judge to have an interest that could be substantially affected by the outcome' of a proceeding involving the partner's law firm."[45]

In contrast, in Weinberger v. Equifax, Inc.,[46] this court held that the district judge need not recuse himself where his son was an associate in a law firm that represented one of the parties in the litigation. The court explained that the son's "salary interest as an associate is too remote to fall under this 'financial interest' prohibition."[47]

In this case, Judge Harmon's father-in-law, Frank Harmon, was a retired partner of Baker Botts from the time the judge received the case in 1998 until Mr. Harmon's death on August 5, 1999. Mr. Harmon received retirement benefits from Baker Botts until his death, at which point, Mr. Harmon's son (Judge Harmon's husband) received death

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[43] 609 F.2d 1101 (5th Cir. 1980).

[44] *Id.* at 1113.

[45] *Id.*

[46] 557 F.2d 456, 463 (5th Cir. 1977).

[47] *Id.*

benefits from the firm. Both the retirement and death benefits were fixed sum amounts, with the exception that part of both formulae included a cost of living adjustment that included the lesser of (1) "the cost of living adjustment called for by the U.S. Department of Labor's U.S. Consumer Price Index in a given year" or (2) "the percentage increase in income of the fifth highest paid partner" at Baker Botts.

IQ argues that the component of the cost of living adjustment that takes into account the salary of the fifth highest paid partner is sufficient to require Judge Harmon's disqualification under § 455(b)(5)(iii). This argument is not sound. First, no matter how much money the fifth highest paid Baker Botts partner earns, the Consumer Price Index always functioned as a ceiling on the adjustment to which Frank was entitled. This is so because Frank or his son was only entitled to the lesser increase of the two factors. The interest of Judge Harmon's father-in-law and husband in Baker Botts' earnings is more remote than an associate's interest in the financial well-being of his firm. An associate's continued employment or the amount of his bonus may depend on the financial success of the firm. However, this is an insufficient financial interest to require disqualification under Weinberger. It follows that Judge Harmon was not required to recuse herself under 28 U.S.C. § 455(b)(5)(iii).

Similarly, § 455(a) requires a federal judge to disqualify himself in any proceeding in which "his impartiality might be reasonably questioned."[48] This test is

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[48] 28 U.S.C. § 455(a).

objective.[49] A judge should disqualify himself "if the reasonable man, were he to know all the circumstances, would harbor doubts about the judge's impartiality."[50]

Based on the above discussion, we are satisfied that the fact that Judge Harmon's father-in-law was a retired partner at Baker Botts is too remote to raise a reasonable doubt about her impartiality. Therefore, Judge Harmon was not required to recuse herself in this case under either § 455(b)(5)(iii) or § 455(a), and IQ is not entitled to a new trial.

V.

For the reasons given above, the judgment of the district court is AFFIRMED.

AFFIRMED.

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[49] *See Potashnick*, 609 F.2d at 1111.

[50] *See Potashnick*, 609 F.2d at 1111.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Civil Action No. H-98-1909

[Filed July 6, 2001]

IQ PRODUCTS COMPANY,	)
Plaintiff	)
	)
VS.	)
	)
SNAP PRODUCT,	)
Defendant	)
	)

FINAL SUMMARY JUDGMENT

Pursuant to the memoranda and orders issued by this Court on March 12, 2001 (# 98) and on July 3, 2001 (#121 and 122), the dismissal of all counter claims against Plaintiff IQ Products Company ("IQ") brought by Intervenor-Defendant Pennzoil Products Company n/k/a Pennzoil-Quaker State Company ("Pennzoil") and Defendant Snap Products Inc. n/k/a Pandora Manufacturing, Inc. ("Pandora") (#105) in the above referenced action, the Court

ORDERS that FINAL SUMMARY JUDGMENT is GRANTED in favor of Pennzoil and Pandora Manufacturing

against IQ. IQ shall take nothing and shall bear all costs of court.

THIS IS A FINAL JUDGMENT.

SIGNED at Houston, Texas, this 6th day of July, 2001.

/s/_____

MELINDA HARMON
UNITED STATES DISTRICT JUDGE

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Civil Action No. H-98-1909

[Filed July 5, 2001]

IQ PRODUCTS COMPANY,	)
Plaintiff	)
	)
VS.	)
	)
SNAP PRODUCT,	)
Defendant	)
	)

ORDER

Pending before the Court in the above referenced action, alleging under section 43 (a) of the Lanham Act, 15 U.S.C. § 1125(a), false labeling and advertising of the tire inflator product "Fix-A-Flat" in use between March 25, 1997 and February 18, 1999 as being non-flammable and non-explosive, is Plaintiff IQ Products Company's appeal of the magistrate's order entered on May 16, 2001 and motion for this Court to reconsider or clarify its memorandum and order entered on March 12, 2001 (instrument #117).

Because Judge Stacy's order excluding expert testimony was based on this Court's March 12, 2001 memorandum and order, the Court reviews the motion to reconsider or clarify first.

Plaintiff argues that this Court ruled only that the omission of "flammable" from the label of Fix-A-Flat was not actionable under the Lanham Act and that Lanham Act claims based on Pennzoil's false statements in sales catalogues, sales sheets, sales brochures, technical bulletins, print advertisements, and written or oral statements to purchasers or potential purchasers of Fix-A-Flat still remain before the Court. IQ complains that Judge Stacy wrongly interpreted the Court's order when she found that all the flammability issues were thereby removed from the case.

IQ also contends that this Court erred in its decision regarding the omission of a federally mandated "flammable" label from the Fix-A-Flat can because the label then conveyed a false message about the product to the targeted audience of retailers, not end users, since the Fix-A-Flat aerosol can cannot pass the flame-extension test under 16 C.F.R. § 1500.3 (c) (6) (viii).

Defendant Pennzoil-Quaker State Company ("Pennzoil) objects that the motion for summary judgment granted by the Court was limited to the failure to label Fix-A-Flat as "flammable" or "extremely flammable" because IQ's pleading regarding flammability under the Lanham Act also addressed only the labeling on the can. Furthermore, Pennzoil insists that the motion to reconsider offers no new authorities, but merely rehashes the same arguments made and rejected by the Court previously.

This Court agrees with Pennzoil and denies the motion to reconsider. The Court stands by its earlier ruling that IQ is impermissibly using the Lanham Act to usurp the role of the Consumer Product Safety Commission to enforce IQ's interpretation of how the flame extension test should be applied under the Food, Drug and Cosmetic Act and the regulations promulgated under that Act. In addition the Court grants IQ's motion to clarify only to the extent necessary for it to make clear that IQ never pled any claims related to flammability under the Lanham Act other than the failure to label the Fix-A-Flat can. IQ never amended its pleadings to expand its claim to include other affirmative representations of non-flammability. Discovery has long been closed, trial is imminent, and the time has passed when such an amendment would not be severely prejudicial to Defendants.

IQ appeals Judge Stacy's order excluding the majority of the opinions of IQ's experts (Dr. Al E. Birdwell, Yohanne Gupta, and Dr. O. John Jacobus), in light of this Court's summary judgment on the flammability issue, as not relevant to the remaining issues in this case and as unreliable. Fed. R. Evid. 702; *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993); *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999). Most of the appeal relies on IQ's arguments that other issues of flammability remain, which the Court has just rejected. Thus the only Lanham Act claims still pending relate to representations concerning the explosivity of Fix-A-Flat. The Court has reviewed Judge Stacy's order and the underlying record in detail and *de novo* and agrees with her rulings in all respects.

Accordingly, for the reasons stated above, the Court

ORDERS that (1) IQ's motion to reconsider is DENIED; (2) its motion to clarify is GRANTED to the extent that the Court finds that IQ never pled any claims related to flammability under the Lanham Act other than the failure to label the Fix-A-Flat can; and (3) Judge Stacy's order excluding most of IQ's expert testimony is AFFIRMED.

SIGNED at Houston, Texas, this 3rd day of July, 2001.

/s/_____
MELINDA HARMON
UNITED STATES DISTRICT JUDGE

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Civil Action No. H-98-1909

[Filed July 5, 2001]

IQ PRODUCTS COMPANY,	)
Plaintiff	)
	)
VS.	)
	)
SNAP PRODUCTS,	)
Defendant	)
	)

MEMORANDUM AND ORDER

Pending before the Court in the above referenced action, alleging under section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a), false labeling and advertising of the tire inflator product "Fix-A-Flat" in use between March 25, 1997 and February 18, 1999 as being non-flammable and non-explosive, is a motion for summary judgment regarding damages[1] (instrument #70), filed by Pennzoil-Quaker State

[1] Because Pennzoil no longer sells the formulation of Fix-A-Flat in dispute, IQ's prayer for injunctive relief is moot.

Company ("Pennzoil"), formerly known as Pennzoil Products Company. Defendant Pandora Manufacturing, Inc., formerly known as Snap Products, Inc., was granted leave to adopt Pennzoil's motion (#105).

Snap Products ("Snap") manufactured and sold Fix-A-Flat from April 1993 through November 3, 1997. On February 1, 1996, Snap Products, Inc. changed its name to Pandora Manufacturing Inc. On November 4, 1997 Pennzoil purchased certain assets of Pandora Manufacturing, Inc., including Fix-A-Flat, and reformulated the product, which it placed on the market in January 1998.

Three defending entities involved here, i.e., Snap, Pandora Manufacturing, and Pennzoil, were or are competitors of IQ Products Company ("IQ") in the tire inflator business and sold their products in and to the same market, i.e. to retailers who in turn sold them to consumers. IQ's tire inflator products are marketed under the brand names of "RepairSafe," "AirUp," and "Primis."

For purposes of liability of Pennzoil, it is important to distinguish evidence relating to the period before Pennzoil's

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Moreover, on March 13, 2001, this Court granted a partial summary judgment in favor of Pennzoil, concluding that the Lanham Act is not a proper vehicle for IQ's claim of failure to label the product as flammable. In response to a motion to clarify or reconsider, this Court recently made clear that because the sole Lanham Act claim relating to flammability that was plead by IQ was Defendants' failure to label Fix-A-Flat as "flammable" or "extremely flammable," the only remaining claim relates to alleged misrepresentations about the product's non-explosivity.

ownership of Fix-A-Flat from any evidence relating to the time when Pennzoil did own the product. IQ has unfortunately lumped them together and called them "Pennzoil-Quaker State."[2]

The movant seeking a federal summary judgment initially must inform the court of the basis for its motion and point out those portions of the pleadings, depositions, answers to interrogatories, and admissions on file that demonstrate the absence of a genuine issue of material fact and show that it is entitled to a judgment as a matter of law. Fed. R. Cir. P. 56(c) ; *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The movant need not negate the opposing party's claims nor

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[2] In the opening of its complaint and at ¶ 9, IQ explained that it

> files its COMPLAINT complaining of Snap Products, Inc. or its successors, the defendant in this case ("Snap") ....
>
> 9. As necessary, IQ will amend its Complaint to include the current manufacturer and seller of Fix-A-Flat continues to list Snap Products, Inc. as its manufacturer, IQ commences this case only against Snap, but "Snap" as used herein includes any Snap successor who possessed an interest in Fix-A-Flat from March 25, 1997, through the present, or who now possesses an interest in or to Fix-A-Flat.

IQ never amended, and in the instant motion, Instead of using "Snap" to refer to all thosewho subsequently acquired an interest in "Fix-A-Flat," IQ has, perhaps with questionable motive, employed "Pennzoil" as the all encompassing name.

produce evidence showing an absence of a genuine factual issue, but may rely on the absence of evidence to support essential elements of opposing party's claims.[3] *International Assoc. of Machinists & Aerospace Workers, Lodge No. 2504 v. Intercontinental Mfg. Co.*, 812 F.2d 219, 222 (5th Cir. 1987). The burden then shifts to the non-movant to set forth specific facts and competent summary judgment evidence to raise a genuine issue of material fact on each essential element of any claim on which it bears the burden of proof at trial. Fed. R. Civ. P. 56(c). The substantive law governing the suit identifies the essential elements of the claims at issue and therefore indicates which facts are material. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The non-moving party may not rest on mere allegations or denials in its pleadings, but must produce affirmative evidence and specific facts. *Anderson*, 477 U.S. at 256-57. It meets this burden only if it shows that "a reasonable jury could return a verdict for the non-moving party." *Id.* at 254. A mere scintilla of evidence will not preclude granting of a motion for summary judgment. *Id.* at 252.

All reasonable inferences must be drawn in favor of the non-moving party. *Matsushita Electric Industrial Co., Ltd, v. Zenith Radio Corp.*, 475 U.S. 574. 587-88 (1986), citing *United States v. Diebold*, 369 U.S. 654, 655 (1962). Once the burden of proof has shifted to the non-movant, it "must do more that simply show that there is some metaphysical doubt as to the material facts." *Id.* at 586.

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[3] IQ erroneously argues that Pennzoil is required to demonstrate with portions of pleadings and discovery documents the absence of a genuine issue of material fact on claims on which IQ bears the burden of proof.

Instead it must produce evidence upon which a jury could reasonably base a verdict in its favor. *Anderson*, 477 U.S. at 249. "[T]here is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Id.*, 477 U,S. at 249-50. Moreover the non-movant must "go beyond the pleadings and by its own affidavits or by depositions, answers to interrogatories and admissions on file, designate specific facts that show there is a genuine issue for trial." *Webb v. Cardiothoracic Surgery Assoc. of North Texas, P.A.*, 139 F.3d 532, 536 (5th Cir. 1998). Unsubstantiated and subjective beliefs and conclusory allegations and opinions are not competent summary judgment evidence. *Grimes v. Texas Dept. of Mental Health and Mental Retardation*, 102 F.3d 137, 139-40 (5th Cir. 1996); *Forsyth v. Barr*, 19 F.3d 1527, 1533 (5th Cir.), *cert. denied*, 513 U.S. 871 (1994); *Topalian v. Ehrman*, 954 F.2d 1125, 1131 (5th Cir.), *cert. denied*, 505 U.S. 825 (1992). The non-movant cannot discharge its burden by offering vague allegations and legal conclusions. *Salis v. Carpenter* 908 F.2d 299, 305 (5th Cir. 1992); *Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 889 (1990).

Contrary to IQ's stance in this action, pleadings are not summary judgment evidence. *Wallace v. Texas Tech University*, 80 F.3d 1042, 1045 (5th Cir. 1996), *citing Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994)(en banc) .

Furthermore, a district court is not required by Rule 55 to sift through the record in search of evidence to support a party's opposition to summary judgment. *Ragas v.*

Tennessee Gas Pipeline Co., 136 F.3d 455, 458 (5th Cir. 1998), *citing Skotak v. Tenneco Resins, Inc* , 953 F.2d 909, 915-16 & n.7 (5th Cir.), *cert. denied*, 506 U.S. 832 (1992).

Section 43(a) of the Lanham Act provides in relevant part,

> Any person who . . . uses . . . any . . . false or misleading description of fact, or false or misleading representation of fact, which . . . misrepresents the nature, characteristics, [or] qualities . . . of his or her or another person's goods shall be liable in a civil action by any person who believes that he or she is likely to be damaged by such act.

15 U.S.C. § 1125(a) (i) (West 1998).

To prevail on such a claim under the Lanham Act, a plaintiff has the burden of proving a *prima facie* case of false advertising under section 43(a) of the Lanham Act by establishing all of the following elements:

> (1) A false or misleading statement of fact about a product;
> (2) Such statement either deceived or had the capacity to deceive a substantial segment of potential consumers;
> (3) The deception was material, in that it is likely to influence the consumer's purchasing decision;
> (4) The product is in interstate commerce; and

> (5) The plaintiff has been or is likely to be injured as a result of the statement at issue.

Pizza Hut v. Papa John's Int'l, Inc., 227 F.3d 489, 495 (5th Cir. 2000), *cert. denied*, 121 S. Ct. 1355 (2001).

"The focus of the Lanham Act is on 'commercial interests [that] have been harmed by a competitor's false advertising.'" *Procter & Gamble Co. v. Amway Corp.*, 242 F.3d 539, 563 (5th Cir. 2001). To obtain monetary damages for false advertising under § 43(a) of the Lanham Act, the basis of the motion for summary judgment here, under the first prong of the *Pizza Hut* test, a plaintiff must demonstrate that the advertisement was (1) literally false or (2) likely to mislead and confuse customers. *Pizza Hut*, 227 F.3d at 495. While a statement of fact is actionable under § 43(a), a statement of general opinion, including puffery,[4] is not. *Id.* If the statement in issue is shown to be literally false, the court must simply assume that it actually misled consumers, without requiring any evidence of such deception from the plaintiff. *Id.* If the statement is shown to be misleading or ambiguous, however, to recover monetary damages under § 43(a) a plaintiff must demonstrate actual deception, i.e., that it actually misled or confused consumers, by introducing

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[4] The Fifth Circuit indicates that "non-actionable 'puffery' comes in at least two possible forms: (i) an exaggerated, blustering, and boasting statement upon which no reasonable buyer would be justified in relying; or (2) a general claim of superiority over comparable products that is so vague that it can be understood as nothing more than a mere expression of opinion." 227 F.3d at 497. The Court finds that the statements in dispute here do not constitute puffery.

extrinsic evidence of the disputed statement's impact on consumers, i.e., materiality. *Id.* at 497.[5] In other words, the plaintiff must prove actual deception by direct evidence of consumer reaction to the advertising or by circumstantial evidence of consumer surveys or consumer reaction tests. *Id.* Thus for statements not literally false, Plaintiff IQ Products Company ("IQ") must prove that at least some customers were actually deceived and that it has been injured by the reliance of those consumers on the false advertising. 4 J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition* § 27:42, at 27-67 (4th ed. 2000) (actual deception and resulting customer reliance can be demonstrated by evidence of actual diversion of sales, by customer surveys, or by testimony of a dealer, distributor or customer).[6] Furthermore, IQ must demonstrate that Pennzoil's allegedly false advertising was a substantial factor in causing its customer-retailers to purchase Fix-A-Flat instead of IQ's tire inflator products. *Seven-Up Co. v. Coca Cola Co.*, 86 F.3d 1379, 1387 (5th Cir. 1997).

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[5] One must view the allegedly false or misleading statement in the light of the overall context in which it appears. *Pizza Hut*, 227 F.3d at 495 n.5. "Context will often help to determine whether the statement at issue is so overblown and exaggerated that no reasonable consumer would likely rely upon it." *Id.*

[6] The burden for injunctive relief is lower. The plaintiff must show that the defendant's representations "have a tendency to deceive customers" by showing that some customers were confused by the advertisements, but it need not offer consumer surveys or testimony demonstrating actual deception. 227 F.3d at 497.

Pennzoil's motion contends that IQ has not and cannot meet its burden of proof to support its claim for damages for false advertising under the Lanham Act. IQ has failed to show that customers were actually deceived by allegedly false advertising claims made by Pennzoil or that IQ had been injured by actual consumer reliance on the allegedly false advertising. Nor has it shown that but for Pennzoil's allegedly false advertising of Fix-A-Flat, IQ would have obtained all of Pennzoil's sales. It has not performed a customer survey nor found evidence of actual diversion of sales nor presented the testimony of a dealer, distributor or customer showing deception by Pennzoil and customer reliance on that deception. Pennzoil maintains that it is therefore entitled to summary judgment and to dismissal of IQ's claims in their entirety.

In response, IQ asserts that on February 18, 1999, Pennzoil initiated a nationwide recall of its Fix-A-Flat cans because of their potential to explode and that Pennzoil subsequently manufactured and sold the product with a new formula. IQ contends that two of Pennzoil's advertising statements were literally false, i.e., (i) that Fix-A-Flat was non-explosive and contained a non-explosive formula (hereinafter, "first statement") and (2) that Fix-A-Flat was non-flammable (hereinafter, "second statement"). IQ urges that two other advertising statements, while not literally false, were false and misleading in the context of Pennzoil's advertising: the third disputed statement, "DO NOT use with other tire inflator products. Other products may contain explosive gases which could cause injury to you or a tire repair professional" (hereinafter, "third statement"); and the fourth, "DO NOT WELD ON A RIM WITHOUT FIRST REMOVING THE TIRE FROM THE RIM. FAILURE TO

DO SO COULD CAUSE THE TIRE TO EXPLODE REGARDLESS OF WHETHER TIRE INFLATOR IS USED" (hereinafter, "fourth statement"). IQ asserts that each of the four statements either deceived or had the capacity to deceive a substantial segment of potential purchasers and was material in that it was likely to influence a purchaser's purchasing decision. IQ further represents that Fix-A-Flat was in interstate commerce, a fact not contested by Defendants, and that IQ was injured as a result, an assertion that Pennzoil maintains IQ has not proven. IQ asserts that the challenged advertising *inter alia* appeared not only on labels on Fix-A-Flat cans, but in sales catalogues, sales sheets, sales brochures, technical bulletins, print advertisements, and written or oral statements to purchasers or potential purchasers of Fix-A-Flat.

IQ emphasizes that the summary judgment motion focuses on only two elements of the *Pizza Hut prima facie* case, i.e., the third, materiality, and the fifth, IQ's resulting injury. Citing *Pizza Hut*, IQ contends that because Pennzoil's first two statements are literally false, IQ need not show materiality, or that these two statements actually deceived purchasers; instead the Court must presume that they actually misled the retail purchaser. *Pizza Hut*, 227 F.3d at 495 ("With respect to materiality, when the statements of fact at issue are shown to be literally false, the plaintiff need not introduce evidence on the issue of the impact of the statements on consumers. In such a circumstance, the court will assume that the statements actually misled consumers.").

IQ lists the exhibit numbers of various documents that it submitted under seal, allegedly as evidence of actual deception of retailer-purchasers for the third and fourth

statements, which IQ claims are false and misleading,[7] but not literally false. Exs. 1,[8] 3-5,[9] 9-12,[10]

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[7] IQ argues that the third statement was false and misleading in context because it implies that while "[o]ther products may contain explosive gases which could cause injury to you or a tire repair professional," Fix-A-Flat did not. In actuality, Fix-A-Flat was explosive and did contain a mixture of explosive gases, insists IQ. The fourth statement was false and misleading because it failed to inform the purchaser that the likelihood of tire explosion increased significantly with the use of Fix-A-Flat.

[8] A copy of *Olson v. Snap Products, Inc.*, 29 F. Supp. I027 (D. Minn. 1998) (holding that under Minnesota law, evidence that in 1994-1996 Snap Products deceptively labeled Fix-A-Flat tire inflator as nonexplosive despite knowing of the high probability of tire welding explosions was sufficient to support the plaintiff-consumer's pleading of a claim for punitive damages).

[9] Ex. 3 is a copy of Pandora's Answer and Counterclaim (#5 in the record of this action); Ex. 4 is a copy of Pennzoil's Complaint against IQ (#8 in the record); and Ex. 5 is a copy of the deposition of Steven Koch, Senior Vice President, Marketing Services and Customer Department at Pennzoil and its corporate representative for deposition.

[10] Ex. 9 is a September 8, 1998 memorandum from Dick Doyle to Northeast Sales Reps, maintaining that Fix-A-Flat is not flammable, that therefore a marketing decision had been made some time previously to replace the "non-Flammable" claim from the label with a Starburst declaring Snap's 25th anniversary, and that appropriate warnings were clearly stated on the can.

Ex. 10 compares market dollar share of various "Flat Tire Fixers" yearly from 1995 through 1999, while Ex. 11 compares the

20,[11] 22-23,[12] 27-30,[13]32-36,[14] 39-49[15]

Unit Share of competitive tire inflator products.

Ex. 12 is a confidential list of customers of Pennzoil and the number of cans of Fix-A-Flat each purchased in 1998.

[11] Ex. 20 is identical to Ex. 9.

[12] Ex. 22 is a copy of a page from Snap Products, Inc. Technical Bulletin describing Fix-A-Flat. Ex. 23 is an interoffice Pennzoil memorandum from Dewey Szemenyei to Don Johnson regarding motor oil.

[13] Ex. 27 is a May 25, 1994 letter report to Paul Hughett from C. James Dahn of Safety Consulting Engineers, Inc. regarding a series of tests performed to measure the flammability of sealed pressure tire inflators, specifically the effect of introducing an ignition source (sparks from a spark plug) into tires injected with different tire inflators mounted on a Ford Explorer. Snap's Fix-A-Flat met the consumer test criteria. Ex. 28, a report of the same date to Hughett relates to the same tests. Ex. 29 is a report submitted on July 8, 1994, by Dahn to Snap Products, Inc. regarding the explosibility tests it requested. Its conclusion was, "The Snap Fix-A-Flat inflator used in the manner as tested per consumer test criteria did not display any fire or explosion hazards in its use. Further testing is planned to identify any fire or explosion hazards in other situations." Ex. 30 appears to be an advertisement for Snap products, including three sizes of Fix-A-Flat using "a safe, nonflammable propellant."

[14] Ex. 32 is a March 31, 1994 summary by Jim Wells of a meeting of Snap's Sam McGinnis and others regarding standard flame testing of "six (6) samples of SNAP material." It recites that McGinnis witnessed a flame flashing back and extending beyond the 18 inch mark. They discussed the fact that despite assurances that

the product would not explode in a tire, McGinnis had considered stopping a shipment the previous week, but was advised by his attorney not to. He stated that he realized that a recall was a possibility, but that it would cost millions of dollars and could cost him his job and put Snap out of business. He also stated that he was still considering a recall if there was any danger to the public. Outside laboratory work had characterized a tire explosion as strong enough to be fatal to anyone standing nearby. McGinnis showed Wells more than twenty pages written by Monty Johnsen on the safety of Fix-A-Flat. Wells commented that "it was a cheap trick intended to deceive the public into believing that the Fix-A-Flat product was harmless."

Ex. 33 is an April 11, 1994 memorandum from McGinnis regarding his own investigation and conclusion that"the product is possibly unsafe and has the potential to cause bodily harm or death to an unsuspecting tire repair professional or consumer through misuse." He noted that regarding labeling, the product failed the flame test and the drum test. As for explosivity, McGinnis reported, "Product evacuated into a large diameter ball under pressure will erupt into a massive fireball when exposed to an ignition source. The experiment exposed the samples to an ignition source in both the liquid and vapor phase of the product. Both are volatile." He reported that the Consumer Product Safety Commission was investigating Snap's mislabeling and warned, "if they conclude a problem does exist, I think each of you realize [sic] the consequences." He placed the product on hold until proper investigation had been conducted and data supporting the product's safety were submitted. He also stated that employees would be told the product was on hold because of a documentation glitch.

Ex. 34 is a June 15, 1994 memorandum from Jeff Ketchledge updating the situation and indicating that Snap modified the specifications of Fix-A-Flat to pass the flame extension test,

tested it, and issued updated reports. "This change will protect Snap from competition's misinformation to our customers."

Ex. 35 is a compliancy summary, but the copy is not completely legible.

Ex. 36 is "Everything you always needed to know" about "NEW FORMULA FIX-A-FLAT," touting the product and assuring consumers that it is not dangerous. When asked about Snap's advertising of the product as "non-explosive" rather than "nonflammable," the brochure, assuring the reader that the product would "absolutely not" explode, provided two reasons:

> (1) Non-flammable by aerosol standards does not mean that the product will not ignite. It only means the product will not extend a flame greater than 18 [inches] when actuated for four to six seconds.
> (2) "Non-Flammable" is a word Snap chose for marketing back in 1990. The inside industry understands this terminology but not many end users--that is, the actual consumers--do. Snap recently conducted a consumer panel test and explained the background of the old flammable inflators without using the words "non-flammable" or "non-explosive." The results were overwhelmingly in favor of "nonexplosive."

[15] Ex. 39 is a May 20, 1996 letter from Snap's President, Tim Shingleton, to Chris McClain of Wal*Mart Stores regarding Fix-A-Flat. After apologizing for any problems in conducting business with Snap, the letter touts Snap's 51.8% marketshare and states that all testing has demonstrated "that the product is what we say it is and is labeled correctly."

Ex. 40 is an October 9, 1996 letter report from Snap's Tom Davis to Debbie Sawyer of Keller Sawyer, Inc. regarding prices of products, including Fix-A-Flat. Ex. 41 is a letter to potential customer Dennis Katz of Trak Auto providing prices for Fix-A-Flat and stating, "Dennis, I cannot stress enough the fact that most customers of your stature do not dabble in Tire Inflator that consists of an explosive formula." Ex. 42, a sales proposal to Western Auto from Snap, describes its product line, including Fix-A-Flat, which it characterizes as "safe and easy to use." Ex. 43 is a technical bullet for the product. Ex. 44, a letter from Snap's McGinnis to Tim Hazzard of Saxon Industries complaining of Fix-A-Flat's low rating in Auto Express magazine, insists that "[t]he propellants that are blended to create a safe non-explosive gas do not generate as high a vapor pressure as butane/iso-propane propellants. We are not aware of a single complaint or safety related incident in the US related to low pressure in a tire treated with a tire inflator. This combines 25 years of extensive use and over an estimated 625 million cans of total products sold in the US." He insists, "The instructions adhere to strict US standards with proper and adequate warnings to the person using the product and safety issues for the tire repair professional." Ex. 45 is an October 3, 1997 memorandum from Andy Barron incorporating a September 29, 1997 letter from Tim Shingleton regarding new samples being sent to a lab for testing after modification of the Fix-A-Flat formula that failed flame extension testing and did not pass labeling requirements.

Ex. 46, a June 26, 1998 letter to Leighton Hankins of the Kunkel Service Company from Pennzoil's Joel Khan, states, "in no uncertain terms: Fix-A-Flat branded tire inflator is <u>not a flammable aerosol!</u>" It further states that Pennzoil has chosen not to refer to the issue of flammability on the label because, unlike some competitive brands, it is not flammable. Ex. 47, a September 27, 1999 letter from Khan to Tom Cinnamon of EBY-BROWN,

to #83, and Exs. 1-9 to #81. For the most part, the Court notes Plaintiffs have not pointed to specific sections of these documents nor identified and analyzed or characterized specific portions that Plaintiffs believe to be relevant supporting evidence for their allegations in response to the motion for summary judgment. The Court has indicated that it is not required by Rule 56 to sift through the record in search of evidence to support a party's opposition to summary judgment. *Ragas v. Tennessee Gas Pipeline Co.*, 136 F.3d 455, 458 (5th Cir. 1998), *citing Skotak v. Tenneco Resins, Inc.*, 953 F 2d 909, 915-16 & n.7 (5th Cir.), *cert. denied*, 506 U.S. 832 (1992).

Citing the discussion of the history of the tire-inflator market and Fix-A-Flat's role in that market in *Olson v. Snap Products*, 29 F. Supp.2d 1027 (S. Minn. 1998) (Ex. 1 to #83), even though that lawsuit does not relate to the product at the time it was owned by Pennzoil nor deal with the modifications in the product made by Pennzoil, IQ represents that originally Fix-A-Flat was non-explosive and non-flammable, but that in early 1994 Snap Products changed the formula. According to IQ, Pennzoil's own tests demonstrated that the product was then explosive and flammable, even

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concerning price increases in Fix-A-Flat because of the propellant, states, "Non-Flammability is an expensive feature. Fix-A-Flat is the overwhelming category leader." Ex. 48 is a videotaped pretrial examination of nonparty witness Troy H. Scriven, who worked as a research engineer for Pennzoil from August 1991 till January 1993.

Ex, 49, a copy of McGinnis' January 18, 1999 deposition in the *Olson* case.

though it advertised otherwise from January 1994 until Pennzoil recalled the product on February 18, 1999 because of its potential to explode. Exs. 1, 33, 26-28, 32 and 48 (to instrument #83). IQ ignores the distinction between ownership by Snap/Pandora and ownership by Pennzoil, but lumps them together with evidence that relates only to the former entity. IQ further argues that Pennzoil knew that explosivity and flammability are often decisive factors in retailers' purchasing decisions, but presents no evidence of a customer-retailer actually relying on representations of non-flammability and non-explosiveness in purchasing the product from Snap/Pandora or Pennzoil. Instead IQ points to "admissions" in Pandora's and Pennzoil's pleadings that IQ contends, in a strained and unpersuasive argument, establish actual deception. Specifically, Pandora and Pennzoil's pleadings initially alleged that IQ made false claims that Defendants marketed Fix-A-Flat with incorrect and unsafe labeling that deceived a number of their customers and caused IQ actual harm. According to IQ, the pleadings thus demonstrate that retailers relied on Defendants' deceptive representations of Fix-A-Flat's advertised non-explosivity and non-flammability. Defendants' early pleadings also asserted that IQ's false claims "have likely deceived a substantial number of Pennzoil's customers," "have caused Pennzoil actual harm," "have caused Pennzoil pecuniary loss" and that "there is actual deception of, or at least a tendency to deceive, a substantial portion of the intended audience." Thus IQ argues that Pandora and Pennzoil's pleadings' admissions establish actual deception.[16]

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[16] This Court disagrees and reiterates that pleadings do not constitute summary judgment evidence. *Wallace v. Texas Tech University*, 80 F.3d 1042, 1046 (5th Cir. 1996), *citing Little v.*

IQ maintains that its remedies under the Lanham Act include recovery of Pennzoil's profits, lost profits, and reasonable attorney's fees. According to IQ, because the motion does not address the first, the profits issue must be decided by evidence at trial.[17] IQ further maintains that the motion deals only with IQ's claim for recovery of its own lost profits and that the motion argues that IQ has shown no injury from Pennzoil's Lanham violations to support a remedy of IQ's lost profits.

This Court does not agree with IQ regarding trial being necessary for the remedies issues because the motion for summary judgment failed to address that issue. If IQ cannot avoid summary judgment because of a failure to submit evidence on an essential element of its *prima facie* case under the Lanham Act, on which it bears the burden of proof, the Court need never reach the remedy issue.

IQ insists that because the first two challenged statements are literally false, the Court must assume that the two statements actually misled retain purchasers and IQ need not produce evidence to establish that deception. As for Pennzoil's third and fourth statements, which IQ characterizes as false and misleading in the context of Pennzoil's claims that Fix-A-Flat was non-explosive and non-flammable, IQ

Liquid Air Corp., 37 F.3d 1069, 1075 (5th Cir. 1994)(*en banc*).

[17] IQ states that to recover Pennzoil's profits, IQ need only prove Pennzoil's sales; Pennzoil must prove all elements of cost or deduction that it claims. 15 U.S.C. § 1117(a). Ex. 50 lists Pennzoil's monthly Fix-A-Flat sales and profits from January 1997 through December 31, 1999. See also Exhibit 4.

insists that the record is replete with proof of actual deception of the retail purchasers. It conclusorily states that Pennzoil was able to make its Fix-A-Flat sales between March 25, 1997 and the recall on February 18, 1999 "only because Pennzoil continued to make false claims about Fix-A-Flat in its advertising," and that had the retailers known that they were buying a product that was flammable and explosive, they would not have purchased it. IQ contends that Pennzoil knew such was the case as early as November 1996 when its sales manager wrote a potential retailer-customer, "I cannot stress enough the fact that most customers of your stature do not dabble in Tire Inflator that consists of an explosive formula."[18] Ex. 41.

IQ insists that to recover lost profits under 15 U.S.C. § 1117 (a),[19] the plaintiff need prove only the defendant's

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[18] The Court finds that IQ has taken out of context and misinterpreted this statement by Snap's Sales Manager, which constituted a kind of flattery to encourage a purchase of Fix-A-Flat, as evidenced by the whole of the letter in which it is found. The Court reads the remark, which was calculated to persuade Dennis Katz to purchase Fix-A-Flat over other brands, as unambiguously referring to tire inflators of competitors in contrast to the non-explosive Fix-A-Flat.

[19] Under § 1117, "subject to the principles of equity," the Lanham Act allows the successful litigant to recover "(1) defendant's profits; (2) any damages sustained by the plaintiff; and (3) the costs of the action." It further provides, "If the court shall find that the amount of the recovery based on profits is either inadequate or excessive the court may in its discretion enter judgment for such sum as the court shall find to be just, according to the circumstances of the case."

sales, while the defendant must prove all elements of cost or any claimed deduction. It points to Exhibit 50 to #83 and Ex. 4 to #81 to show that Pennzoil sold more than 35 million cans of Fix-A-Flat during the relevant period and profited millions of dollars from the sale. IQ maintains, without evidentiary support, that Pennzoil was able to effect sales during the relevant period only because it made the false claims in its advertising. Again without proof, IQ states that it was the only competitor in the market selling tire inflator products at comparable prices to Pennzoil's with the ability and capacity to absorb Pennzoil's share. Thus IQ claims to have suffered material injury from Pennzoil's Lanham Act claims.

In reply, Pennzoil first objects to IQ's summary judgment evidence, specifically Ex. 1 (opinion in *Olson v. Snap Products, Inc.*); 6 (letter of Robert Youth with attachments); 17 (chart prepared by IQ's lawyer); 18 (lawyer chart); 19 (lawyer chart); and 49 (deposition of Sam McGinnis in a different lawsuit). Pennzoi! contends that these exhibits are inadmissible under the Federal Rules of Evidence because they are hearsay and are irrelevant Ex. 49, it further contends, should be excluded under Rule 32 of the Fed. R. of Civ. P.

Pennzoil further complains of "IQ's confusing convergence of Pennzoil-Quaker State and Pandora under the moniker 'Pennzoil,'" even when IQ relies on evidence that pre-dates Pennzoil's ownership of Fix-A-Flat. The Court also finds this to be the critical failure in IQ's opposition to the motion for summary judgment. Pennzoil identifies Exs. 16, 22, and 27-45 as irrelevant, because Pennzoil did not yet own the product, and some of them to be hearsay as to Pennzoil.

After reviewing these exhibits, the Court agrees with Pennzoil that they are not admissible.

Pennzoil also objects to IQ's incorporation by reference and moves to strike Exs. 1-9 to instrument #81,[20] materials submitted in IQ's opposition to Pennzoil's motion-to exclude IQ's experts, and argues these materials are inadmissible and not evidence properly before the Court. Pennzoil is incorrect here, as the district court considers the entire record in reviewing a motion for summary judgment. *Blow v. City of San Antonio, Texas*, 236 F.3d 293, 296 (5th Cir. 2001) ("Summary judgment is appropriate only if the full

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[20] Ex. 1, an affidavit from marketing expert Al E. Birdwell, stating *inter alia*, that the "non-explosive" advertising was merely a marketing tool to distinguish Fix-A-Flat from other products and that had it been correctly labelled as "flammable," retailers and consumers would not have purchased it Because the Court has granted partial summary judgment in favor of Pennzoil on the issue of product labelling and flammability, this affidavit is irrelevant as to IQ's claim relating to the labelling on the can. Ex. 2 is a copy of Birdwell's 187-page deposition testimony, which IQ has not marked nor identified particular portions on which it relies for specific arguments. Ex. 3 consists of exhibits to the deposition.

Other exhibits are apparently documents reviewed by Birdwell in his marketing review to determine damages. Ex. 4 is a chart demonstrating sales of RepairSafe and AirUp in 1997, 1998, and 1999. Ex. 5 if a summary of IQ Tire Inflator sales, units and profit dollars in the same three years. Ex. 6 consists of documents supporting IQ's damage analysis for the period from March 1, 1997 through December 31, 1998. The Court cannot identify Exs. 7 and 8. Ex. 9 consists of copies of advertisements for a variety of products.

record discloses 'no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law.'"); *Thomas v. Great Atlantic & Pacific Tea Co.*, 233 F.3d 326, 329 (5th Cir. 2000) (On reviewing a motion for summary judgment, the district court, and subsequently the appellate court *de novo*, reviews "the record as a whole, but must disregard evidence favorable to the moving party that the jury is not required to believe. This is, we give credence to evidence favoring the nonmoving party as well as that evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that such evidence comes from disinterested witnesses."). Nevertheless, in light of Plaintiff's lack of specific discussion of the significance of these documents as support for their opposition to Pennzoil's motion and their failure to provide such evidence relating to the period when Pennzoil owned and assumed liability for any defects in the product, the Court finds that IQ's exhibits are irrelevant as to Pennzoil. Moreover, because they relate to damages remedies before IQ has leaped the hurdle of demonstrating a *prima facie* case of copyright infringement, these arguments are premature.

As for the substantive issues, Pennzoil contends that neither of the first two statements is literally false and therefore IQ's failure to show actual deception with respect to all four statements is fatal to itscase. The only evidence in the record of the alleged explosivity of Fix-A-Flat is the testing and other material, submitted by IQ through its expert, O. John Jacobus, Ph.D. and relating to testing in April and September 1997, before Pennzoil purchased the Fix-A-Flat line from Pandora on November 4, 1997 and shortly thereafter reformulated the Fix-A-Flat products in January 1998. (Snap/Pandora has not independently responded to the

motion for summary judgment.) Thus there is no evidence of explosivity of Fix-A-Flat at the time it was advertised and sold by Pennzoil. The Court agrees.

Pennzoil also argues that when viewed in context (*Pizza Hut*, 227 F.3d at 495 n.5.), which would include any directions for proper use, the statement is not literally false because the Fix-A-Flat directions warned consumers not to add air to the tire after using Fix-A-Flat. Dr Jacobus, in testing the product, did add air after injecting Fix-A-Flat into the tire. Pennzoil insists that because there is no governmental or industry test to determine explosivity and because Dr. Jacobus concedes that he did not comply with the directions, his evidence of "explosivity," while admissible,[21] does not establish literal falsity. *Munoz*, 200 F.3d at 301 ("If the basis for an expert's opinion is clearly unreliable, the district court may disregard that opinion in deciding whether a party has created a genuine issue of material fact."). IQ has

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[21] Magistrate Judge Frances Stacy, in ruling on Pennzoil's motion to exclude Plaintiff's experts, considered the reliability of Dr. Jacobus' evidence and found it admissible. Noting that the absence of a standardized methodology does not, by itself, invalidate an expert's testing or his conclusions from that testing, she further found that adding air to the tire in contravention of the instructions did not invalidate the results of his test. She wrote, "While such addition of air may call into question or provide a suitable basis for criticizing Dr. Jacobus' testing methodology, or may limit the scope of his explosivity opinion to the circumstances under which the testing was performed, given that Defendant Snap also added air to tires containing Fix-A-Flat in connection with its explosivity testing in 1994, it cannot be said that Dr. Jacobus' addition of air to a tire containing Fix-A-Flat renders his testing methodology unreliable."

not responded with any evidence to the contrary. Once again, the Court agrees with Pennzoil that IQ has failed to demonstrate that the first two statements are literally false on their face or to point to any evidence of flammability or explosivity in Pennzoil's reformulated product during its ownership of Fix-A-Flat.

Furthermore, Pennzoil maintains, IQ asserted only two claims of violation of the Lanham Act, the first targeting failure to label the Fix-A-Flat tire inflator product as "flammable" and the other, representing that Fix-A-Flat was non-explosive. Pennzoil contends that because the Court granted partial summary judgment and held that the Lanham Act was not a proper vehicle for a failure-to-label claim, the Court should dismiss all claims relating to the allegedly second false statement related to flammability. Thus the second of the four challenged statements should not be considered by the Court. In its supplemental brief (#119) and in its opposition to IQ's pending motion to reconsider, Pennzoil argues that IQ's only claim regarding flammability related solely to labeling the product as "flammable" and did not include claims that Defendants affirmatively misrepresented that Fix-A-Flat was non-flammable. Pennzoil further insists that in a Lanham Act false advertising case, the alleged misrepresentations must be specifically identified. *In re Century 21-Re/Max Real Estate Advertising Claims Litig.*, 882 F. Supp. 915, 926-27 (C.D. Cal, 1994); *Max Daetwyler Corp. v. Input Graphics Inc.*, 608 F. Supp. 1549, 1556 (E.D. Pa. 1985).[22] IQ's pleadings do not allege that Pennzoil or

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[22] The Court would add *Sanderson v. Brugman*, No. IP00459CHG, 2001 WL 699876, *8 (S.D. Ind. May 29, 2001); *Barr Laboratories, Inc. v. Quantum Pharmics, Inc.*, 827 F. Supp.

Pandora affirmatively misrepresented Fix-A-Flat as non-flammable, but instead limit the false or misleading statements about flammability to Defendants' failure to label Fix-A-Flat as flammable. Plaintiff's original Complaint ¶¶ 16, 19, 22, 29, 31 and 34 (#1); Plaintiff's Answer to Pennzoil's Complaint and Counterclaim ¶¶ 11, 12, 15, 18, 25, 27 and 30 (#14) .

Pennzoil filed the pleadings with these documents before the Court ruled on IQ's motion to clarify and reconsider its order granting summary judgment on flammability. In denying the motion to reconsider, the Court made clear that as Pennzoil contends, the Court has ruled that flammability is no longer an issue in this case. As this Court noted, moreover, discovery has been completed and trial is imminent in this action. Thus any fair notice to Defendants about the misrepresentations at issue here under Rule 8's pleading requirement should have been provided by a requested amendment a long time ago. To do so now, given the stage of this litigation, would be inequitable and grossly prejudicial to Defendants.

Moreover, Pennzoil continues, the excluded opinions of IQ's experts related "specifically and exclusively to the effect in combination of [Pennzoil's] allegedly improper failure to label Fix-A-Flat as 'flammable' and [Pennzoil's] alleged false representations that Fix-A-Flat contained a 'non-explosive' formula. IQ's experts never opined that the cause of IQ's damages was affirmative representations by [Pennzoil] that Fix-A-Flat was 'non-flammable,' nor did IQ make such

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111, 117-18 (E.D. Pa.).

a contention until long after [Pennzoil] moved for summary judgment on IQ's flammability claim." Furthermore the fact that IQ's damages theory does not assert that the non-explosivity claim independently of its nonflammability labeling claim caused IQ to lose sales undermines any argument that IQ can prove damage causation solely as a result of the non-explosivity claim. Because the Court granted summary judgment in favor of Pennzoil as to flammability labeling, only the non-explosivity claim remains. Pennzoil reiterates that IQ has no evidence that the non-explosivity claim by itself misled buyers. Thus even if IQ could prove literal falsity or actual deception, urges Pennzoil, it lacks evidence of damages because it damages case has always been premised on a combination of the two claims and it has no viable damage model in the absence of flammability labeling. With the exclusion of its witnesses as unreliable and irrelevant by the magistrate's order,[23] IQ also has no evidence of damages causation.

Pennzoil alternatively argues that if the Court does choose to consider the second statement, IQ has not provided any evidence to establish the literal falsity of the statement as to Pennzoil, because the claim is based on the same evidence of Dr. Jacobus based on testing conducted before November 4, 1997 and before Pennzoil purchased Fix-A-Flat and

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[23] Pennzoil points out that Judge Stacy concluded that the evidence on which Dr. Birdwell relied "does not support any conclusion about the marketing effect of the 'non-explosive formula' label on Fix-A-Flat. Rather, the data and evidence relates two labeling factors in combination: the absence of a 'flammability' label from Fix-A-Flat cans and the presence of the 'non-explosive formula' label on Fix-A-Flat cans." Instrument #116 at p. 5.

reformulated it and modified its spray nozzle to improve its already passing performance on a flame extension test.

Finally, relating to the explosivity Lanham Act claim, Pennzoil argues that IQ has failed to submit any evidence that a single retailer-purchaser was actually deceived by Pennzoil's allegedly misleading statements. The summary judgment exhibits identified by IQ are mostly either internal documents, some predating Pennzoil's ownership of the Product in dispute, or the challenged statements themselves. None constitutes evidence of retailer customers' actually being deceived by the statements. IQ failed to perform a customer survey or to depose and submit the testimony of a dealer, distributor or customer demonstrating deception and reliance thereon. The only evidence of actual customer reaction is the testimony of Yohanne Gupta. Ex. 5 to #81. Mr. Gupta testified that Wal-Mart purportedly accepted the proposition that Fix-A-Flat was flammable, but nevertheless continued to sell it. Pennzoil argues that logically Gupta's statement cannot establish actual deception and resulting reliance.

As for IQ's reliance on Pennzoil's and Pandora's pleadings as evidence of actual deception, Pennzoil insists that the allegations in these pleadings, which have since been dismissed, cannot remedy IQ's evidentiary deficiencies. The Court agrees. Moreover, Pennzoil's pleadings denied the cited pertinent allegations made in IQ's pleadings, thus forcing IQ to prove its case.

Pennzoil concludes that summary judgment therefore should be granted in favor of Pennzoil because there is no competent summary judgment evidence of literal falsity or of

actual deception and reliance in even a single lost sale, no less that IQ would have obtained all of Pennzoil's sales from Fix-A-Flat.

In its supplemental brief (#119), Pennzoil re-emphasizes that IQ has failed to show that Defendants' representation that Fix-A-Flat was non-explosive was literally false[24] or that it actually deceived their retail buyers. It has also failed to provide evidence of separate and independent damage causation, as is required. *Rhone-Poulenc Rorer Pharms., Inc. v. Marion Merrell Dow, Inc.*, 93 F.3d 511, 515 (5th Cir. 1996); *ALPO Petfoods, Inc. v, Ralston Purina Co.*, 913 F.2d 958, 959 (D.C. Cir. 1990); *Harper House, Inc. v. Thomas Nelson, Inc.*, 889 F.2d 197, 210 (9th Cir. 1989) ; *Burndy Corp. v. Teledyne Indus., Inc.*, 748 F.2d 767, 771 (2d Cir. 1984) ; *Porous Media Corp. v. Pall Corp.*, 110 F.3d 1329, 1332-22 (5th Cir. 1997) (*en banc*). Specifically Pennzoil contends that IQ has not and could not present competent evidence of either of the two components of its damage model, i.e, that Pennzoil would have lost all of its sales of Fix-A-Flat because retail buyers would not have purchased a single can were it not for the alleged Lanham Act violations and that IQ would have obtained every single sale lost by Pennzoil.

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[24] Pennzoil argues that in context, the instructions on the can label ("READ ALL CAUTIONS AND DIRECTIONS ON BACK PANEL BEFORE USING"), if followed, would prevent the set of conditions that make a tire rupture possible, specifically the warning not to continue to add air to the tire if the leak persists after using Fix-A-Flat.

As noted, the Court agrees with Pennzoil that IQ's pleadings clearly and unambiguously restrict its Lanham Act claims relating to non-flammability to the labeling on Fix-A-Flat cans. It has not pled claims for general misrepresentations in other media, i.e., in sales catalogues, sales sheets, sales brochures, technical bulletins, print advertisements, and written or oral statements to purchasers or potential purchasers of Fix-A-Flat. Nor has the Court changed its mind about granting summary judgment in favor of Pennzoil and Snap/Pandora on the non-flammability labeling claim.

Even if it had not concluded as a matter of law that the Lanham Act is not a proper vehicle for IQ's claim of failure to label the product as flammable, IQ's failure to distinguish the time period and the reformulated product when Pennzoil owned and marketed Fix-A-Flat and to show that Pennzoil's product was flammable and explosive is a failure in its burden of proof against Pennzoil. All of its evidence appears to relate to the period prior to Pennzoil's ownership, i.e., when Fix-A-Flat was owned by Snap/Pandora. Thus Pennzoil would have been entitled to summary judgment on the claim, although Snap/Pandora would not, had the Court not granted summary judgment in favor of both Pennzoil and Snap/Pandora on the non-flammability issue.

The same is true for the non-explosivity Lanham Act claim. There is no evidence of explosivity of the Fix-A-Flat tire inflator during the period of Pennzoil's ownership of it.

Of the four challenged statements, the second relates to flammability and is therefore not properly at issue before the Court. Of the other three, the Court agrees with Pennzoil

that when viewed in the context of the instructions on its use, none is literally false on its face. Thus IQ bears the burden of demonstrating materiality with extrinsic evidence, i.e., that the statements about non-explosivity individually or in combination have misled or confused the retailer-consumers by means of direct evidence of their actual reaction to the statement(s) or by circumstantial evidence, such as surveys or reaction tests. *Pizza Hut*, 227 F.3d at 497. IQ also bears the burden of showing that the statements were a substantial factor in causing IQ's retailer/customers to purchase Fix-A-Flat rather than IQ's tire inflator products. *Seven-Up*, 86 F.3d at 1387. IQ has failed to produce competent summary judgment demonstrating actual deception and reliance or causation.

Moreover, Pennzoil is again correct that IQ has failed to demonstrate that misrepresentations about the product's explosivity, independent of the failure to label Fix-A-Flat as "flammable," caused damages to IQ. Thus for this reason, too, Pennzoil and Snap/Pandora are entitled to summary judgment on damages.

Accordingly, the Court

ORDERS that for the reasons indicated above, Pennzoil's motion for summary judgment on damages is GRANTED as to Pennzoil and Snap/Pandora.

Still pending are Pandora's counterclaims against IQ for interference with prospective business relations, business and product disparagement and misrepresentations about IQ's AirUp products and Pandora's Fix-A-Flat products. Pandora shall inform the Court immediately whether it wishes to

pursue these counterclaims at trial on July 13, 2001. SIGNED at Houston, Texas, this day of July, 2001.

/s/ _____
MELINDA HARMON
UNITED STATES DISTRICT JUDGE

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Civil Action No. H-98-1909

[Filed March 13, 2001]

IQ PRODUCTS COMPANY,	)
Plaintiff	)
	)
VS.	)
	)
SNAP PRODUCTS,	)
Defendant	)
	)

MEMORANDUM AND ORDER

Pending before the Court in the above referenced action, alleging violations of the Lanham Act since March 25, 1997 through the false advertising, labeling, and marketing of Fix-A-Flat (a tire inflator product sold in aerosol cans) and unfair competition with IQ ProductsCompany's ("IQ's") sale of tire inflator products (known as "AirUp" and "RepairSafe"), is *inter alia* Intervenor-Defendant and

competitor Pennzoil-Quaker State Company's ("Pennzoil's")[1] motion for [partial] summary judgment on Plaintiff IQ Products Company's claim that Pennzoil falsely advertised its Fix-A-Flat products when' it failed to label its product as flammable (instrument #66). Defendant Pandora Manufacturing, Inc. ~~f/k/a Snap Products~~, Inc. ("Pandora")[2] seeks to adopt (#76) the motion and Pennzoil's reply to IQ's response, against opposition from IQ (#79) for reasons stated in its response (#67) to Pennzoil's motion for summary judgment.

Because the Court finds that IQ has failed to provide any reason, no less a persuasive one, why Pandora should not be permitted to adopt Pennzoil's pleadings, the Court allows it to do so.

The movant seeking a federal summary judgment initially must inform the court of the basis for his motion and

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[1] Effective February 1, 1996, Snap Products changed its name to Pandora Manufacturing Company. On November 4, 1997, Pennzoil purchased assets of Snap Products, including the tire inflator products in dispute. Since that purchase, Pandora has manufactured, packaged and shipped the tire inflator and other products for Pennzoil. Pennzoil intervened in this suit because to the extent that IQ has disseminated misleading information and material misrepresentations and harmed the business relationship with customers since November 4, 1997, Pennzoil is the real party in interest.

[2] Pandora has counterclaimed against IQ for falsely promoting and misrepresenting IQ's tire inflator products and has alleged claims of Lanham violations, interference with business relations, and business and product disparagement.

point out those portions of the pleadings, depositions, answers to interrogatories, and admissions on file that demonstrate the absence of a genuine issue of material fact and show that he is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56(c) ; *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The movant need not negate the opposing party's claims nor produce evidence showing an absence of a genuine factual issue, but may rely on the absence of evidence to support essential elements of opposing party's claims. *International Assoc. of Machinists & Aerospace Workers, Lodge No. 2504 v. Intercontinental Mfg. Co.*, 812 F.2d 219, 222 (5th Cir. 1987). The burden then shifts to the non-movant to set forth specific facts and competent summary judgment evidence to raise a genuine issue of material fact on each essential element of any claim on which he bears the burden of proof at trial. Fed. R. Cir. P. 56(c). The substantive law governing the suit identifies the essential elements of the claims at issue and therefore indicates which facts are material. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The non-moving party may not rest on mere allegations or denials in its pleadings, but must produce affirmative evidence and specific facts. *Anderson*, 477 U.S. at 256-57. He meets this burden only if he shows that "a reasonable jury could return a verdict for the non-moving party." *Id.* at 254. A mere scintilla of evidence will not preclude granting of a motion for summary judgment. *Id.* at 252.

All reasonable inferences must be drawn in favor of the non-moving party. *Matsushita Electric Industrial Co, Ltd. v. Zenith Radio Corp.*, 475 U.S. 574. 587-88 (1986), citing *United States v. Diebold*, 369 U.S. 654, 655 (1962). Once the burden of proof has shifted to the non-movant, he "must do more that simply show that there is some metaphysical doubt

as to the material facts." *Id.* at 586. Instead he must produce evidence upon which a jury could reasonably base a verdict in his favor. *Anderson*, 477 U.S. at 249. "[T]here is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Id.*, 477 U.S. at 249-50. Moreover the non-movant must "go beyond the pleadings and by his own affidavits or by depositions, answers to interrogatories and admissions on file, designate specific facts that show there is a genuine issue for trial." *Webb v. Cardiothoracic Surgery Assoc. of North Texas*, P.A., 139 F.3d 532, 536 (5th Cir. 1998). Unsubstantiated and subjective beliefs and conclusory allegations and opinions are not competent summary judgment evidence. *Grimes v. Texas Dept. of Mental Health and Mental Retardation*, 102 F.3d 137, 139-40 (5th Cir. 1996); *Forsyth v. Barr*, 19 F.3d 1527, 1533 (5th Cir.), *cert. denied*, 513 U.S. 871 (1994) ; *Topalian v. Ehrman*, 954 F.2d 1125, 1131 (5th Cir.), *cert. denied*, 506 U.S. 825 (1992). The non-movant cannot discharge his burden by offering vague allegations and legal conclusions. *Salis v. Carpenter*, 908 F.2d 299, 305 (5th Cir. 1992) ; *Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 889 (1990).

The motion for summary judgment argues that IQ has improperly tried to assert a cause of action for Pennzoil's alleged failure to label Fix-A-Flat as "Extremely Flammable" or "Flammable" under the Lanham Act, when the claim must be brought under the comprehensive scheme of product regulation and labeling established by the Federal Hazardous Substances Act ("FHSA"), 15 U.S.C. §§ 1261-78. The regulatory agency of the Consumer Product Safety Commission ("CPSC") is responsible for enforcing the FHSA

and promulgating, interpreting, and enforcing regulations under the FHSA.[3] Indeed, among the broad range of powers given to the CPSC by the FHSA is discretion to exempt substances from the FHSA's full requirements, 15 U.S.C. § 1262(c), and to determine whether to prosecute a FHSA violation, 16 C.F.R. § 1009.8.

Pennzoil points out with supporting documentation that IQ since at least 1994 has complained about Fix-A-Flat to the Federal Trade Commission ("FTC") and to the CPSC. The FTC referred IQ's complaint to the National Highway Traffic Safety Administration (NHTSA"), which declined to take a regulatory action because it was not Warranted. The NHTSA found that the risk of using tire inflation products was "not unreasonable to the consumer or motoring public" and "[T]he dangers seem to relate more to the repair or servicing mechanic, who may use short cuts or ignore some of the basic safety precautions relating to tire repair." Exhibit 6, U.S. Department of Transportation Engineering Action Report at 4, Dec. 1991. The CPSC investigated and refused to take regulatory action. IQ now sues in federal court for injunctive relief it was unable to obtain from these federal agencies, as well as for damages. In essence, IQ asks this Court to usurp the role of the CPSC by interpreting the regulations promulgated by the CPSC in the same was as IQ and by

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[3] Both the statute and its legislative history evidence Congress' intent that the CPSC should enforce the scheme of the FHSA. *Riegel Textile Corp. v. Celanese Corp.*, 649 F.2d 894, 901 (2d Cir. 1981) (FHSA intended to be enforced "solely through agency action"); *Isgett v. WalMart Stores*, 976 F. Supp. 422, 427-28 (S.D. Miss. 1997) (no evidence in legislative history that Congress intended to remove enforcement power from CPSC).

enforcing that interpretation of federal labeling requirements under the FHSA in a manner contrary to the decisions of the CPSC and the FTC.

Pennzoil emphasizes that there is no private right of action under the FHSA. *Riegel*, 649 F.2d at 901; *Isgett*, 976 F. Supp. at 429. Private litigation under the statute would "transfer regulatory interpretation and discretion" from the CPSC, with its experience in consumer products, to courts, "which are ill-equipped to undertake the burdens thus imposed upon them." *Riegel*, 649 F.2d at 902. The Second Circuit further opined,

> Implicit in [the FHSA] enforcement scheme is the need of the CPSC to evaluate the exercise of its enforcement power in light of a broad range of policy considerations, particularly the development of a coordinated regulatory program. Because litigants in pursuit of a private remedy are unconstrained by institutional policies of uniformity, they could, by instituting multiple lawsuits, undermine the Act's goal of a coordinated regulatory program. Private litigation could deprive the CPSC of an opportunity to build upon the foundation provided by the FHSA and the CPSC in establishing a sound and strong federal regulatory policy governing hazardous substances. Specifically, such litigation would diminish the discretion of the CPSC to decide whether a substance can be made safe merely through cautionary labeling or must be banned from the marketplace . . . .

Riegel, 649 F.2d at 901-02. Other courts have followed *Riegel* in finding no private right of action under the FHSA. *Isgett*, 976 F. Supp; at 429; *Christenson v. St. Mary's Hosp.*, 835 F. Supp. 498, 501 (D. Minn. 1993); *Palmer v. Liggett Group, Inc.*, 635 F. Supp. 392, 297 (D. Mass. 1984), *rev'd on other grounds*, 825 F.2d 620 (1st Cir. 1987); *Thompson v. Proctor & Gamble Co.*, 1982 WL 114, *3 (N.D. Cal. Dec. 8, 1982); *Sparks v. Metalcraft, Inc.*, 408 N.W.2d 347 (Iowa 1987).

IQ's reliance on the Lanham Act appears to be the result of not being allowed to assert a cause of action under the FHSA. Yet IQ specifically alleges that Fix-A-Flat products should be labeled "flammable" pursuant to regulations promulgated by the CPSC under the FHSA. IQ merely and wrongly attempts to circumvent the regulatory authority of the CPSC and to convert the Lanham Act into a private vehicle for enforcing the FHSA. "What [a statute does] not create directly, the Lanham Act does not create indirectly, at least not in cases requiring original interpretation of [the statute] or the accompanying regulations." *Sandoz Pharmaceuticals v. Richardson-Vicks, Inc.*, 902 F.2d 222, 231 (3d Cir. 1990). *See also Dial A Car, Inc. v. Transportation, Inc.*, 884 F. Supp. 584, 593 (D.D.C. 1995) (inappropriate in a Lanham act case for a court to determine how an administrative agency will interpret and enforce its own regulations, thereby usurping the agency's area of responsibility), *aff'd*, 82 F.3d 484 (D.C. Cir. 1996).

By analogy Pennzoil demonstrates that the Third and Fourth Circuits have rejected similar Lanham Act efforts in cases that should fall under the Food, Drug and Cosmetic Act ("FDCA") . *Sandoz*, 902 F.2d at 230-31 (refusing to "usurp

the administrative agencies' responsibility for interpreting and enforcing potentially ambiguous regulations"); *Mylan Laboratories, Inc. v. Matkari*, 7 F.3d 1130, 1139 (4th Cir 1993)(refusing to allow Mylan to use the Lanham Act to enforce the FDCA). *Riegel* notes the relationship between the FDCA and the FHSA. 649 F.2d at 901. In *Dial A Car. v. Transportation, Inc.*, 82 F.3d at 488-90, the D.C. Circuit, embracing the rational of *Sandoz*, dismissed a plaintiff's Lanham Act claim and warned against turning the Lanham Act into a "handy device" for enforcement of other laws.

Furthermore, argues Pennzoil, a determination of whether Fix-A-Flat is flammable would require analysis, interpretation and application of the FHSA and CPSC regulations, exactly what the courts should avoid. Moreover, the CPS has already considered this question. "[T]he CPS is entitled to substantial amount of deference in interpreting the regulations and implementing their objectives." *United States v. Shelton Wholesale, Inc.*, 34 F. Supp. 2d 1147, 1155 (W.D. Mo. 1999), *citing Udall v. Tallman*, 380 U.S. 1, 16 (1965). "Even if a court would have adopted a better alternative of implementing a statute or regulation, the court is not permitted to substitute its judgment for that of the agency." *Id., citing Chevron U.S.A.v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 n. 11 (1984).

In response, IQ charges that the motion for summary judgment, which does not challenge IQ's ability to prove any required element of its Lanham Act claim,[4] is "a disguised

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[4] IQ states that it must prove the following elements for its claim for misleading advertising under the Lanham Act: (1) Pennzoil made false or misleading statements of fact concerning

request for an early and untimely evidentiary ruling that the fact that Fix-A-Flat was not properly labeled 'Extremely Flammable' or 'Flammable' (as required by federal law) is somehow irrelevant to IQ's ability or entitlement to prove that Pennzoil falsely advertised Fix-A-Flat." IQ has never asserted a private cause of action to enforce the FHSA, nor does-it seek to enforce the FHSA through the Lanham Act; it seeks only to impose liability on Pennzoil for its violations of the Lanham Act.

IQ charges that each case cited by IQ is inapposite, although its discussions of those cases are unclear. Nevertheless, the cases speak for themselves and the Court has reviewed them. In essence IQ insists that it will prove that Pennzoil's advertising that Fix-A-Flat was "Non-Explosive" was literally false and misleading to the public and that the advertising and labeling as to flammability was misleading to the public, which would think that Fix-A-Flat was not flammable because Pennzoil did not disclose on the cans that it was "Extremely Flammable" or "Flammable." *Olson v. Snap Products, Inc.*, 29 F. Supp. 2d 1027 (D. Minn. 1998) (discussing Fix-A-Flat's history and its false aid misleading claims). IQ maintains that it will prove that purchasers of Fix-

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Fix-A Flat; (2) the statement actually or tends to deceive a substantial portion of the intended audience; (3) the statement is material in that it will likely influence the deceived consumer's purchasing decisions; (4) the advertisements were introduced into interstate commerce; and (5) there is some causal link between the challenged statements and harm to IQ. *American Council of Certified Podiatric Physicians & Surgeons v. American Board of Podiatric Surgery, Inc.*, 185 F.3d 606, 613 (6th Cir. 1999) ; *Seven-Up Co. v. Coca-Cola Co.*, 86 F.3d 1379, 1383 n.3 (5th Cir. 1996).

A-Flat considered it nonflammable because it was not labeled "Extremely Flammable" or "Flammable."

Furthermore, IQ argues that no preemptive interpretation of any regulation is involved here. The CPSC has already issued objective criteria that determine when a tire-inflator product in a pressurized aerosol cans must be labeled "Extremely Flammable" or "Flammable" to comply with federal law.

In reply, Pennzoil observes that IQ is mischaracterizing its suit and that "it is because labeling requirements under the [FHSA] are so central to IQ's suit that Pennzoil contends that summary judgment is appropriate" to bar IQ from 'impermissibly seek[ing] to privately enforce the FHSA through the Lanham Act." Any proof of a misleading label that IQ can offer turns on the Court's threshold determination of whether Fix-A-Flat is "Extremely Flammable" or "Flammable", as defined by CPSC regulations promulgated under the FHSA. Pennzoil urges the Court to agree with the Second Circuit that courts are "ill equipped" to exercise this regulatory function under the statute.

After reviewing the pleadings and the applicable law, the Court concurs with Pennzoil that as a matter of law, IQ is impermissibly attempting to circumvent the FHSA by converting the Lanham Act into a vehicle to enforce the FHSA, which bars private actions, and to usurp the regulatory function of the CPSC here. Indeed, IQ has failed to controvert Pennzoil's statements and evidence that the CPSC has already acted on IQ's labeling claims about flammability. Moreover,

IQ has not cited any decision in which a court allowed such a Lanham Act to go forward.

Accordingly, the Court

ORDERS that Pennzoil's motion for summary judgment (#66) solely regarding IQ's claim of misleading labeling as to flammability is GRANTED.

SIGNED at Houston, Texas, this 12th day of March, 2001.

/s/ _____
MELINDA HARMON
UNITED STATES DISTRICT JUDGE

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 01-20764

[Filed October 24, 2002]

IQ PRODUCTS COMPANY, Plaintiff - Intervenor Defendant - Counter Claimant - Appellant	)
v.	)
PENNZOIL PRODUCTS COMPANY, Intervenor Plaintiff - Counter Defendant - Appellee	)
v.	)
PANDORA MANUFACTURING INCORPORATED, also known as Snap Products, Incorporated, Defendant - Appellee	)

Appeal from the United States District Court
for the Southern District of Texas, Houston

JUDGES:
Before DAVIS, DeMOSS, and STEWART, Circuit Judges. Chief Judge King and Judges Jones and Clement did not participate in the consideration of the rehearing en banc.

OPINION

ON PETITION FOR REHEARING AND REHEARING EN BANC

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (FED.R.APP.P. and 5TH CIR.R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) The Petition for Rehearing is DENIED and the court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor, (FED.R.APP.P. and 5th CIR.R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) A member of the court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ _____
W. Eugene Davis
United States Circuit Judge

Chief Judge King and Judges Jones and Clement did not participate in the consideration of the rehearing en banc.